Post-Conviction and Sentencing Matters

9

9.1 Chapter Overview

This chapter explores issues that a court may have to consider after a sex offender has been convicted, including:

- The potential revocation of the sex offender's bond.
- The rights and duties associated with the sentencing hearing.
- The alternatives available for imposition of sentence, such as probation, imprisonment, sex offender treatment programs, sex offender registration, and restitution.
- A defendant's post-sentencing rights and duties, such as DNA testing and setting aside convictions.

9.2 Post-Conviction Bail

*For a discussion of the applicable laws governing bail determinations before conviction, see Chapter 5.

Before conviction, a defendant has a right, with certain exceptions, to reasonable bail. See Const 1963, art 1, §§ 15, 16; MCL 765.5; and MCL 765.6.* However, after conviction, a defendant is "no longer entitled to the presumption of innocence and release on bail or bond becomes a matter of discretion, not of right." See *People v Tate*, 134 Mich App 682, 693 (1984); MCL 765.6(1) and MCL 770.9.

In determining whether a defendant is entitled to post-conviction bail, a court must first consider the stage of the proceedings—before or after sentencing—and then whether the defendant was convicted of an "assaultive crime,"* as defined in MCL 770.9a(3). See Section 9.2(C) for a definition of "assaultive crime," which includes all CSC offenses.

A. Before Sentencing

1. Convictions For "Assaultive Crimes"

MCL 770.9a(1) *requires* a court to deny bail to the defendant convicted of and awaiting sentence for an "assaultive crime,"* unless the court finds by clear and convincing evidence that defendant is not likely to pose a danger to other persons.

*See Section 9.2(C) for a definition of "assaultive crime."

2. Convictions For Sexual Assault of a Minor

If a defendant is convicted of sexual assault of a minor and is awaiting sentence, the court must detain the defendant and deny him or her bail. MCL 770.9b(1). A minor refers to an individual who is less than 16 years of age. MCL 770.9b(3)(a). "Sexual assault of a minor" means a violation of any of the following involving an individual who is less than 16 years of age:

- First-degree criminal sexual conduct, MCL 750.520b. MCL 770.9b(3)(b)(*i*).
- Second-degree criminal sexual conduct, MCL 750.520c. MCL 770.9b(3)(b)(*i*).
- Third-degree criminal sexual conduct involving force or coercion used to accomplish penetration, MCL 750.520d(1)(b). MCL 770.9b(3)(b)(*i*).
- Third-degree criminal sexual conduct involving penetration of a victim who is mentally incapable, mentally incapacitated, or physically helpless, MCL 750.520d(1)(c). MCL 770.9b(3)(b)(*i*).
- Third-degree criminal sexual conduct involving penetration of a victim who is related to the defendant by blood or affinity to the third degree, MCL 750.520d(1)(d). MCL 770.9b(3)(b)(*i*).
- Third-degree criminal sexual conduct involving a victim who is between the ages of 16 and 18 and a student at a public or nonpublic school and the defendant is a teacher, substitute teacher, or administrator of that public or nonpublic school, MCL 750.520d(1)(e). MCL 770.9b(3)(b)(*i*).

  Note: MCL 770.9b(3)(b)(*i*) contradicts itself. In order for the defendant to be convicted of MCL 750.520d(1)(e), the victim must be at least 16 years of age but less than 18 years of age. However, pursuant to MCL 770.9b, "sexual assault of a minor" requires that the victim be less than 16 years of age.

- Third-degree criminal sexual conduct involving penetration of a victim who is at least 13 years old but under the age of 16, MCL 750.520d(1)(a), if the defendant is five or more years older than the victim. MCL 770.9b(3)(b)(*ii*).

- Assault with intent to commit criminal sexual conduct, MCL 750.520g. MCL 770.9b(3)(b)(*iii*).

3. Convictions For Crimes Other Than "Assaultive Crimes"

*See Section 9.2(C) for a definition of "assaultive crime."

MCR 6.106(H)(2) permits a court, on motion of a party or on its own initiative, to make a de novo determination and modify a prior release decision, or reopen a prior custody hearing of a defendant convicted of and awaiting sentence for a crime other than an "assaultive crime."*

B. After Sentencing and Pending Appeal

1. Convictions For "Assaultive Crimes"

*See *People v Nevers*, 462 Mich 913 (2000).

MCL 770.9a(2)(a)-(b) *require* a court to deny bail to a defendant convicted of an "assaultive crime" where the defendant has been sentenced to a term of imprisonment and has filed an appeal (or leave to appeal), unless the trial court (or the court to which the appeal is taken) finds by clear and convincing evidence that both of the following exist:*

- The defendant is not likely to pose a danger to other persons.
- The appeal or application raises a substantial question of law or fact.

Pending a prosecution appeal of a *reversed* conviction, a defendant's request for bail must be analyzed under the statutes governing post-conviction appeals—MCL 770.8, MCL 770.9, and MCL 770.9a(2)—and not the statute governing prosecution appeals, MCL 765.7, which permits a defendant to be released on personal recognizance. *People v Sligh*, 431 Mich 673, 681-682 (1988).

2. Convictions For "Sexual Assault of a Minor"

If a defendant has been convicted and sentenced for committing a sexual assault against a minor and files an appeal or application to appeal, the court must detain the defendant and deny bail. MCL 770.9b(2). See Section 9.2(A)(2), above, for the definition of "sexual assault of a minor."

3. Convictions For Crimes Other Than "Assaultive Crimes"

People v Giacalone, 16 Mich App 352, 355-357 (1969) *requires* a court to analyze a defendant's bail under the following factors, where the defendant has been convicted, sentenced, and pending his or her own appeal for a crime other than an "assaultive crime":

- The likelihood that defendant will appear when required;
- The potential for harm to the community;
- The substantiality of the grounds for appeal; and

- The risk to the proper administration of justice.

C. Definition of "Assaultive Crime"

MCL 770.9a(3) defines "assaultive crime" as any of the following crimes:

- Assault against Family Independence Agency employee causing serious bodily impairment, MCL 750.81c(3). (Added by 2002 PA 483, effective October 1, 2002.)
- Felonious assault, MCL 750.82.
- Assault with intent to murder, MCL 750.83.
- Assault with intent to do great bodily harm less than murder, MCL 750.84.
- Assault with intent to maim, MCL 750.86.
- Assault with intent to commit a felony, MCL 750.87.
- Assault with intent to rob (unarmed), MCL 750.88.
- Assault with intent to rob (armed), MCL 750.89.
- Intentional assaultive conduct against pregnant individual with intent to cause miscarriage or death to embryo or fetus, MCL 750.90a. (Added by 2002 PA 483, effective October 1, 2002.)
- Intentional assaultive conduct against pregnant individual causing great bodily harm, serious or aggravated injury, or miscarriage or death to embryo or fetus, MCL 750.90b. (Added by 2002 PA 483, effective October 1, 2002.)
- Attempted murder, MCL 750.91. (Added by 2002 PA 483, effective October 1, 2002.)
- A violation of MCL 750.200 to 750.212a [governing explosives, bombs, and harmful devices]. (Added by 2002 PA 483, effective October 1, 2002.)
- First-degree murder, MCL 750.316.
- Second-degree murder, MCL 750.317.
- Manslaughter, MCL 750.321.
- Kidnapping, MCL 750.349.
- Prisoner taking another as hostage, MCL 750.349a.
- Kidnapping child under 14, MCL 750.350.
- Mayhem, MCL 750.397.

- Stalking, MCL 750.411h. (Added by 2002 PA 483, effective October 1, 2002.)
- Aggravated stalking, MCL 750.411i. (Added by 2002 PA 483, effective October 1, 2002.)
- First-degree criminal sexual conduct, MCL 750.520b.
- Second-degree criminal sexual conduct, MCL 750.520c.
- Third-degree criminal sexual conduct, MCL 750.520d.
- Fourth-degree criminal sexual conduct, MCL 750.520e.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.
- Armed robbery, MCL 750.529.
- Carjacking, MCL 750.529a.
- Unarmed robbery, MCL 750.530.
- A violation of MCL 750.543a to 750.543z [governing terrorist crimes]. (Added by 2002 PA 483, effective October 1, 2002.)

D. Appellate and Trial Courts Have Concurrent Jurisdiction to Decide Bail

*For a list of "assaultive crimes," see Section 9.2(C).

Trial courts and appellate courts have concurrent jurisdiction to make bail and release decisions in criminal cases pending appeal or leave to appeal. Two statutes, MCL 770.8 and MCL 770.9, establish concurrent jurisdiction between these courts for "bailable" offenses that are not "assaultive crimes."* MCL 770.9a establishes concurrent jurisdiction for "assaultive crimes," which include non-bailable offenses. See Section 5.3 for a list of non-bailable offenses.

> **Note:** The Michigan Supreme Court has held that an application for a federal writ of habeas corpus does not constitute a criminal "appeal" under MCL 770.8, the statute permitting bail during the process of appeal, since a court's authority under MCL 770.8 is "limited to the time *during* the appellate process, and federal habeas corpus proceedings are not a continuation of that process. *People v Jones*, 467 Mich 301, 307 (2002) (emphasis in original).

Although trial courts and appellate courts have concurrent jurisdiction under statute to decide criminal bail matters, the following Michigan Court Rules delineate the division of authority when deciding bail matters.

MCR 7.208(F) provides that "[t]he trial court retains authority over stay and bond matters except as the Court of Appeals otherwise orders."

MCR 6.106(H) provides that "[a] party seeking review of a release decision may file a motion in the court having appellate jurisdiction over the court that made the release decision." The reviewing court may stay, vacate, modify, or reverse the release decision, but only on finding an abuse of discretion. *Id*.

MCR 7.209(D) provides that "the Court of Appeals may amend the amount of bond set by the trial court, order an additional or different bond and set the amount, or require different or additional sureties." Additionally, MCR 7.209(D) permits the Court of Appeals to "grant a stay of proceedings in the trial court or stay of effect or enforcement of any judgment or order of a trial court on the terms it deems just." Finally, MCR 7.209(D) allows the Court of Appeals to "refer a bond or bail matter to the court from which the appeal is taken."

9.3 Testing and Counseling for Venereal Disease, Hepatitis, and HIV

This section discusses the statutory provisions requiring a court to order a defendant or juvenile to be tested and counseled for venereal disease, hepatitis, and HIV after he or she has been convicted of or found responsible for a specified sex offense. For discussion of statutory requirements as they pertain to pre-conviction or pre-adjudication testing and counseling, see Section 6.13.

A. Mandatory Testing and Counseling

Under MCL 333.5129(4), a defendant who is convicted of, or a juvenile who is found responsible for, violating any of the following offenses, must be ordered by the court with jurisdiction over the criminal prosecution or juvenile hearing to be examined or tested for venereal disease, hepatitis B infection, hepatitis C infection, HIV infection, or AIDS:*

*SCAO Form MC 234.

- Accosting, enticing, or soliciting a child, MCL 750.145a.
- Gross indecency between males, MCL 750.338.
- Gross indecency between females, MCL 750.338a.
- Gross indecency between males and females, MCL 750.338b.
- Soliciting prostitution, MCL 750.448.
- Receiving a person into a place of prostitution, MCL 750.449.
- Engaging services for purpose of prostitution, MCL 750.449a.
- Aiding and abetting an act prohibited by MCL 750.448 (soliciting prostitution) or aiding and abetting an act prohibited by MCL 750.449 (receiving a person into a place of prostitution), MCL 750.450.

- Keeping, maintaining, operating house of ill-fame, MCL 750.452.
- Pandering, MCL 750.455.
- First-degree criminal sexual conduct, MCL 750.520b.
- Second-degree criminal sexual conduct, MCL 750.520c.
- Third-degree criminal sexual conduct, MCL 750.520d.
- Fourth-degree criminal sexual conduct, MCL 750.520e.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.
- Intravenously using a controlled substance, MCL 333.7404.*
- A local ordinance prohibiting prostitution, solicitation, gross indecency, or the intravenous use of a controlled substance.

*A person charged with or convicted of this crime, or a corresponding local ordinance, is subject to the testing, counseling, and information distribution requirements regarding hepatitis B, hepatitis C, HIV, and AIDS, but not venereal disease. MCL 333.5129(9).

Additionally, the court with relevant jurisdiction must also order the defendant or juvenile to undergo counseling, which must include, at a minimum, information regarding treatment, transmission, and protective measures. MCL 333.5129(4).

"Venereal disease" means "syphilis, gonorrhea, chancroid, lymphogranuloma venereum, granuloma inguinale, and other sexually transmitted diseases which the department [the department of community health] by rule may designate and require to be reported." MCL 333.5101(1)(h).

B. Confidentiality of Test Results

Except as provided below in MCL 333.5129(5)-(7), or as otherwise provided by law, the required examinations and tests must be confidentially administered by a licensed physician, the department of community health, or a local health department. MCL 333.5129(4). Also, the test results or the fact that testing was ordered to determine the presence of HIV infection or AIDS are subject to the physician-patient privilege under MCL 600.2157. MCL 333.5131(2).

C. Disclosure of Test Results

MCL 333.5129(5)-(7) provide three limited exceptions to the foregoing confidentiality requirements. Under these exceptions, the person or agency conducting the examination must disclose the defendant's examination or test results (and other medical information, when specified) to the following persons or entities:

- The victim or person with whom defendant allegedly engaged in sexual intercourse or sexual contact or who was exposed to a body fluid during the course of the crime, if the victim or person consents.

MCL 333.5129(5). The court or probate court is responsible for providing the person or agency conducting the examination with the name, address, and telephone number of the victim or other person, if consent is provided. *Id*.

- The court or probate court. MCL 333.5129(6). The examination or test results, including any other medical information, must be made part of the court or probate court record only *after* the defendant is sentenced or an order of disposition is entered for the child. *Id*. This court record is confidential and may only be disclosed to one or more of the following:
  - The defendant or child [juvenile respondent]. MCL 333.5129(6)(a).
  - The local health department. MCL 333.5129(6)(b).
  - The department of public health. MCL 333.5129(6)(c).
  - The victim or other person required to be informed of the results; or, if the victim or other person is a minor or otherwise incapacitated, to the victim's or other person's parent, guardian, or person in loco parentis. MCL 333.5129(6)(d).
  - The defendant or juvenile, upon written authorization, or to the juvenile's parent, guardian, or person in loco parentis. MCL 333.5129(6)(e).
  - As otherwise provided by law. MCL 333.5129(6)(f).
- The department of corrections (for defendants), and the person related to the juvenile or the director of the public or private agency, institution, or facility (for juveniles), if the defendant or juvenile is placed under the custody of any of these entities. MCL 333.5129(7). The court or probate court is responsible for transmitting a copy of the examination and test results, including any other medical information, to these departments, agencies, and facilities. *Id*.

Under MCL 333.5129(7), a person or agency receiving test results or other medical information obtained pursuant to MCL 333.5129(6) or MCL 333.5129(7) from an individual found to be infected with HIV or AIDS is prohibited from disclosing the test results or other medical information, except as specifically permitted under MCL 333.5131 [if made pursuant to a subpoena, court order, or consent, or if made to protect the health of the individual, to prevent further transmission of HIV, or to diagnose and care for a patient]. A person who violates MCL 333.5131 is guilty of a misdemeanor punishable by imprisonment for not more than one year or a maximum $5,000.00, or both. MCL 333.5131(8).

D. Positive Test Results Require Referral for Appropriate Medical Care

A person counseled, examined, or tested under MCL 333.5129 and found to be infected with a venereal disease, hepatitis B, hepatitis C, or HIV must be referred by the agency providing the counseling or testing for appropriate medical care. MCL 333.5129(8). The agency is not financially responsible for the person's medical care received as a result of the referral. *Id*.

E. Ordering Payment of the Costs of Examination and Testing

Upon conviction or juvenile adjudication, the court may order an individual who is examined or tested under MCL 333.5129 to "pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test." MCL 333.5129(10). MCL 333.5129(11) states:

> "An individual who is ordered to pay the costs of an examination or test under [MCL 333.5129(10)] shall pay those costs within 30 days after the order is issued or as otherwise provided by the court. The amount ordered to be paid under [MCL 333.5129(10)] shall be paid to the clerk of the court, who shall transmit the appropriate amount to the physician or local health department named in the order. If an individual is ordered to pay a combination of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments upon conviction in addition to the costs ordered under [MCL 333.5129(10)], the payments shall be allocated as provided under the probate code of 1939, 1939 PA 288, MCL 710.21 to 712A.32, the code of criminal procedure, 1927 PA 175, MCL 760.1 to 777.69, and the crime victim's rights act, 1985 PA 87, MCL 780.751 to 780.834. An individual who fails to pay the costs within the 30-day period or as otherwise ordered by the court is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both."

9.4 The Sentencing Hearing

This section discusses the various rights a court must consider before imposing sentence upon a sex offender.

> **Note:** MCR 6.425(b)(2) governs sentencing procedures generally. A detailed discussion of all such procedures is beyond the scope of this Benchbook.

A. Defendant's Right to Counsel

1. Ex Parte Presentence Conferences

A defendant has a right to counsel at an ex parte, presentence conference between a trial judge and a probation officer. *People v Oliver*, 90 Mich App 144, 150 (1979), rev'd on other grounds 407 Mich 857 (1979). This same right applies to a presentence conference between a judge and prosecutor, see *People v Von Everett*, 110 Mich App 393, 396-397 (1981), and a judge and police officer. *People v Vroman*, 148 Mich App 291, 295-296 (1985), overruled on other grounds 431 Mich at 298 n 18.

However, in *People v Rodriquez*, 124 Mich App 773, 777 (1983), the Court of Appeals declined to hold that a defendant has a right to counsel at an ex parte conference with a CSC-I victim before sentencing. Although it questioned the wisdom of the judge's conduct, the Court found that the ex parte conference between the judge and victim before sentencing was not a critical stage of the proceedings, and it likened it to probation officer interviews of criminal sexual conduct victims.

2. At Sentencing

The sentencing hearing is a critical stage in the criminal proceedings, and, absent waiver, the defendant must be represented by counsel. *People v Johnson*, 386 Mich 305, 317 (1971).

A valid waiver of counsel at trial does not necessarily constitute a waiver of counsel at the time of sentencing. In *People v Russell*, 254 Mich App 11 (2002), the trial court permitted defendant's first appointed counsel to withdraw after defendant complained of his representation. Afterward, the trial court appointed another attorney. On the first day of trial, the defendant, because of an expressed dissatisfaction with appointed counsel, and also because of an alleged "personality conflict," requested appointment of substitute counsel, which was denied by the trial court. Defendant thereafter repeatedly rejected representation by his court-appointed counsel but said he wanted to be represented by counsel. After being thoroughly advised of the risks of self-representation, the trial court concluded that defendant had knowingly, intelligently, and voluntarily waived his right to representation. At sentencing, the trial court did not advise defendant "of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent)," as required under MCR 6.005(E).

On appeal, defendant argued that the trial court erred when it failed at sentencing to comply with the requirements of MCR 6.005(E). He also alleged prejudice, claiming he wanted counsel at sentencing and that he did not validly waive counsel. Finally, he alleged that his sentence might have been less severe if he was represented by counsel. The Court of Appeals held that by failing to comply with MCR 6.005(E) the trial court committed reversible error, and so the case was remanded for appointment of counsel (if

desired by defendant), and resentencing. In support of its decision, the Court stated:

> "Although the record confirms that defendant's position had not changed in that he wanted to be represented by counsel but was willing to accept [his second] court-appointed counsel, the premise of a valid waiver of counsel at trial may no longer have existed at the time of sentencing two months after the trial. Defendant's waiver of counsel at trial was premised on the trial court's proper denial of defendant's motion for substitute counsel, and thereafter, defendant knowingly, intelligently and voluntarily chose to proceed pro se rather than accept court-appointed counsel. At the time of sentencing, however, the continued vitality of that premise, that defendant was not entitled to appointment of substitute counsel, was questionable. While the record at trial supported the conclusion that [the second counsel] was ready, able and willing to effectively represent defendant at trial, the record at sentencing indicates it might have been an abuse of discretion for the trial court to have denied a request for substitute counsel had it been made." *Id*. at 20–21.

The Court found that such a complete denial of counsel at a critical stage of a criminal proceeding is "structural error rendering unreliable the result and requiring automatic reversal." *Id*. at 21. Additionally, it found that "the failure to comply with MCR 6.005(E) denied defendant the substantial right of being offered appointed counsel and that this trial error seriously affected the fairness, integrity or public reputation of judicial proceedings . . . ." *Id*. Finally, the Court held that since the speedy trial clock had stopped ticking, and defendant was incarcerated pending sentence on two drug charges requiring consecutive sentences of up to life, the trial court should have adjourned defendant's sentencing hearing: "Delaying defendant's sentencing for a week or two to facilitate appointment of substitute counsel would not have been an undue burden to the criminal justice system." *Id*.

B. Defendant's Right of Allocution

"Allocution" is a "statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence." *Black's Law Dictionary* (St. Paul, MN: West, 7th ed, 1999), p 75.

Before imposing sentence, a court must give the defendant *and* defendant's attorney "an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence . . . ." MCR 6.425(D)(2)(c). See also *People v Theobald*, 117 Mich App 216, 219 (1982) (noting that "defense counsel's knowledge of the law, the facts of the case, the plea

procedure and the information contained in the presentence report make the opportunity for defense counsel to advise the court no less important than defendant's opportunity.")

Under MCR 6.425(D)(2)(c), a trial court need only give the defendant an "opportunity" or "chance" to allocute or address the court before sentence is imposed. The trial court need not directly address, or specifically ask, the defendant whether he or she has anything to say before sentencing. *People v Petit*, 466 Mich 624, 628-629 (2002). In *Petit*, the trial court, before imposition of sentence, did not specifically ask the defendant if she had anything to say before it sentenced her. Instead, after defendant's attorney allocuted on defendant's behalf, it asked if there was "anything further," to which the defense attorney responded, "No, Judge." Thus defendant never allocuted before sentence was imposed. On these facts, the Michigan Supreme Court found that the trial court complied with the allocution requirement in MCR 6.425(D)(2)(c) since it afforded defendant the "opportunity" to allocute by asking if there was "anything further?" The Supreme Court held:

> "While it is unclear to whom this question was addressed, it is clear that defendant's counsel responded to the court's inquiry by indicating that there was, in fact, nothing further to say. At this juncture, defendant had the option, that is, the opportunity, of addressing the court, and she was not precluded or prevented from doing so. In our judgment, the trial court's failure to specifically ask defendant if she had anything to say did not violate MCR 6.425(D)(2)(c) because this rule simply does not require such a personal and direct inquiry. It is noteworthy that some of our court rules do require the court to personally address the defendant, see, e.g., MCR 5.941(C) (requiring the court to 'personally address the juvenile'); MCR 6.302(B) (requiring the court to 'speak [ ] directly to the defendant'); MCR 6.402 and MCR 6.410 (requiring the court to 'address [ ] the defendant personally'). To give meaning to those instances where our court rules require the court to directly address the defendant and to those rules, like that at issue here, where they do not, we conclude that MCR 6.425(D)(2)(c) only requires that the opportunity to allocute be given. Accordingly, in our judgment, the trial court here complied with the rule by generally asking if there was 'anything further.' *Petit, supra* at 628-629.

Although the Supreme Court held that the judge's question of "Anything further?" satisfies the allocution requirements of MCR 6.425(D)(2)(c), it noted that this type of question is not the best way to provide a defendant with an "opportunity" to allocute. As a better practice, the Supreme Court urged trial courts to *specifically* ask defendants if they have anything to say on their own behalf before sentencing. *Petit, supra* at 629 n 3.

> **Note:** In its opinion, the Supreme Court expressly overruled *People v Berry*, 409 Mich 774, 781 (1980), which interpreted the precursor to MCR 6.425(D)(2)(c), GCR 1963, 785.8, as requiring the trial court to, in all cases, strictly comply with the rule and to inquire specifically of the defendant on whether he or she wishes to address the court before imposition of sentence. *Petit*, *supra* at 633.

The Michigan Supreme Court recognized the historic underpinnings of allocution and reaffirmed the fundamental importance of affording a defendant the opportunity to allocute before he or she is sentenced in *People v Petty*, 469 Mich 108, 120–121 (2003). *Petty* involved a juvenile convicted and sentenced as an adult in designated case proceedings. The trial court did not allow the juvenile defendant an opportunity to speak before imposing sentence. The Michigan Supreme Court reaffirmed its statement in *People v Petit*, 466 Mich 624, 629 n 3 (2002), that although MCR 6.425(D)(2)(c) does not require a court to specifically ask a defendant whether he or she wishes to speak, the better practice is to do so.

A court may, in its discretion, place a defendant under oath before allocution. *People v Jones (On Rehearing)*, 201 Mich App 449, 452-456 (1993). Placing a defendant under oath before sentencing will not violate the defendant's Fifth Amendment right to remain silent or the right to allocution, unless the defendant asserts the privilege against self-incrimination at allocution or, at the very least, demonstrates some unconstitutional level of coercion forcing the defendant to make a statement. *Id*. at 456.

C. Victim's and Prosecutor's Rights of Allocution

A crime victim's right "to make a statement to the court at sentencing" is preserved in Const 1963, art 1, § 24. A sexual assault victim, like any crime victim, has a right to submit an oral or written impact statement for inclusion in a presentence investigation report (PSIR) *and* to make an oral impact statement at sentencing. See MCL 771.14(2)(b) (PSIR); and MCL 780.765 (felony sentencing).*

*Substantially similar provisions apply to juvenile delinquency, designated, and "serious misdemeanor" cases. See MCL 780.793(1); and MCL 780.825.

> **Note:** Further discussion of victim impact statements is outside the scope of this Benchbook. For detailed information on victim impact statements, see Miller, *Crime Victims Rights Manual* (MJI, 2001), Chapter 9.

Before imposition of sentence, a court must give the victim and prosecutor "an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence." MCR 6.425(D)(2)(c).*

*See Section 9.4(B) for a discussion of MCR 6.425's allocution requirements.

Resentencing is not required where a victim was not afforded the opportunity for allocution simply because the prosecutor provided the victim an incorrect date for the sentencing hearing. *People v Pfeiffer*, 207 Mich App 151, 160 (1994) ("We hold that under the circumstances of this case, where the

inability of the victim's family to address the court was due to the prosecutor's providing incorrect information regarding the sentencing date to the victim's family, where the court had a victim impact statement in the Pre-Sentence Investigation Report (PSIR), and where the sentencing went forward as scheduled without objection by the prosecutor, the sentence was not invalid, and, therefore, the court was without jurisdiction to resentence.")

> **Note:** Because sex-related criminal cases involve sensitive personal matters that are difficult for some people to discuss publicly, many trial courts prefer to schedule sentencing hearings for these cases at the end of the day, so that victims may provide oral impact statements in less crowded courtrooms.

9.5 Imposition of Sentence

In sexual assault cases, a sentencing court's range of options is often circumscribed by several statutory provisions that prohibit sex offenders from participating in certain activities and programs. The following sections discuss these statutory limitations. Also discussed in this section are general sentencing considerations, sentencing guidelines, probation, day parole, sex offender treatment programs, and restitution. Sex offender registration is the subject of Section 11.2.

A. Information to Consider at Sentencing

A sentencing court should consider the following objectives in determining an appropriate sentence for an offender:

- Reformation of the offender;
- Protection of society;
- Punishment and discipline of the offender; and
- The deterrence of others from committing like offenses. *People v Snow*, 386 Mich 586, 592 (1972).

See also *People v Rice*, 235 Mich App 429, 446 (1999) (there is no requirement that a sentencing court expressly mention each objective when imposing sentence).

A sentence must be tailored to the particular circumstances of the case and offender at the time of sentencing. *People v Hooks*, 101 Mich App 673, 681 (1980). A sentence is invalid if the court conforms the sentence to a local sentencing policy rather than imposing an individualized sentence. See *People v Catanzarite*, 211 Mich App 573, 583 (1995); *People v Whalen*, 412 Mich 166, 169-170 (1981); and *People v Chapa*, 407 Mich 309, 311 (1979).

A sentencing court is afforded broad discretion in the sources and types of information to be considered when imposing a sentence, including relevant information regarding the defendant's life and characteristics. *People v Albert*, 207 Mich App 73, 74 (1994). However, this discretion is not unlimited. *People v Adams*, 430 Mich 679, 687 (1988). Proper criteria for determining an appropriate sentence are the sentencing objectives, behavior by the defendant that demonstrates a disrespect for legal processes and a lack of respect for the law, and the sentencing guidelines, which include the nature and severity of the crime and the defendant's previous criminal record. *People v Curry*, 142 Mich App 724, 731 (1985).

The following discussion addresses some specific issues for courts to consider before imposing sentence:

1. Lack of Remorse/Refusal to Admit Guilt

A sentencing court may consider a defendant's lack of remorse in determining potential for rehabilitation and imposition of sentence, but it may not consider, in whole or in part, a defendant's refusal to admit guilt. See *People v Wesley*, 428 Mich 708, 711 (1987); and *People v Steele*, 173 Mich App 502, 506 (1988). A defendant's remorse is not "objective and verifiable" and hence cannot be used to constitute a "substantial and compelling" reason to depart from the appropriate sentencing guidelines range. See *People v Daniel*, 462 Mich 1, 7 (2000); and *People v Fields*, 448 Mich 58, 69, 80 (1995).

2. Perjured Testimony/Subornation of Perjury

A trial court may consider a defendant's own perjury where there is a rational basis in the record for concluding that defendant wilfully made a flagrantly false statement on a material issue. *People v Houston*, 448 Mich 312, 324 (1995). See *People v Kahley*, 277 Mich App 182, 188 (2007) (the trial court properly considered the defendant's perjury where the defendant admitted at his sentencing that he lied to the jury and that he committed the offenses). The court may consider a defendant's subornation of perjury. *People v Syakovich*, 182 Mich App 85, 91 (1989).

3. Polygraphs

A sentencing court should neither broach the subject of polygraph examinations, nor induce the defendant to take a polygraph for sentencing purposes. *People v Towns*, 69 Mich App 475, 478 (1976). However, "[t]he mere passing reference or mere mention of a polygraph test does not automatically give rise to prejudice necessitating reversal." *People v Pottruff*, 116 Mich App 367, 378 (1982). For more information on polygraphs and a criminal sexual conduct defendant's right to take a polygraph, see Section 7.13(A)(1) and MCL 776.21(5). For information on an alleged criminal sexual conduct victim's right to be informed of the results of a defendant's polygraph examination and to be free from being requested or ordered to take

a polygraph examination (or even informed of the option of taking such examination), see Section 7.13(A)(2) and MCL 776.21(2)-(3).

4. Acquittals

A sentencing court may consider offenses for which the defendant was acquitted, including other criminal activities, but it may not make an independent finding of guilt and sentence the defendant on the basis of that finding. See *People v Compagnari*, 233 Mich App 233, 236 (1998); and *People v Coulter (After Remand)*, 205 Mich App 453, 456 (1994).

5. Dismissed Offenses

A sentencing court may consider dismissed charges and separate criminal activity for which no conviction resulted, provided the defendant is given an opportunity for refutation. *People v Wiggins*, 151 Mich App 622, 625 (1986).

6. Evidence Offered At Trial

A sentencing court may consider the evidence offered at trial. *People v Gould*, 225 Mich App 79, 89 (1997).

B. Sentencing Guidelines

The following subsections discuss the general statutory scheme of Michigan's Sentencing Guidelines. Also discussed are offense variables that are often relevant in sexual assault cases.

1. Guideline Framework

The statutory Sentencing Guidelines, mandated by 1998 PA 317, MCL 777.1 et seq., are applicable to "felony"* crimes committed on or after January 1, 1999. A sentencing court must impose a minimum sentence within the appropriate sentence range, unless there is a "substantial and compelling reason" to depart from the Guidelines. MCL 769.34(3). "Substantial and compelling" reasons only exist in exceptional cases, and those reasons should irresistibly grab the court's attention and have considerable worth in determining the length of sentence. *People v Babcock (Babcock I)*, 244 Mich App 64, 75 (2000). Only "objective and verifiable" factors may be used to assess whether there are "substantial and compelling" reasons to depart from the appropriate guideline range. *Id*. A sentencing court must articulate its reasons for departure on the record. *People v Bennett*, 241 Mich App 511 (2000), citing *People v Fleming*, 428 Mich 408, 428 (1987).

*A "felony" is "a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(g).

A sentencing court must also "specifically articulate the reasons why the factors it identifies and relies upon collectively provide 'substantial and compelling' reasons to except the case from the legislatively mandated regime." *People v Johnson (On Remand)*, 223 Mich App 170, 173-174 (1997). Factors used in scoring the guidelines cannot be used as "objective or

verifiable" factors, unless the trial court finds "from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

The trial court abused its discretion when it sentenced a defendant to twice the highest minimum term recommended under the sentencing guidelines without justifying the extent of the departure on the record. *People v Smith*, 482 Mich 292, 295 (2008). The Michigan Supreme Court concluded that providing substantial and compelling reasons for a departure does not satisfy the trial court's duty to "establish why the sentences imposed were proportionate to the offense and the offender." *Id*. The Court further explained "the statutory guidelines require more than an articulation of reasons for *a* departure; they require justification for the *particular* departure made." *Id*. at 303.

The Michigan Supreme Court set out the following summary to assist trial courts in fulfilling their statutory obligations under MCL 769.34(3):

> "(1) The trial court bears the burden of articulating the rationale for the departure it made. A reviewing court may not substitute its own reasons for departure. Nor may it speculate about conceivable reasons for departure that the trial court did not articulate or that cannot reasonably be inferred from what the trial court articulated.
>
> "(2) The trial court must articulate one or more substantial and compelling reasons that justify the departure it made and not simply *any* departure it might have made.
>
> "(3) The trial court's articulation of reasons for the departure must be sufficient to allow adequate appellate review.
>
> "(4) The minimum sentence imposed must be proportionate. That is, the sentence must adequately account for the gravity of the offense and any relevant characteristics of the offender. To be proportionate, a minimum sentence that exceeds the guidelines recommendation must be more appropriate to the offense and the offender than a sentence within the guidelines range would have been.
>
> "(5) When fashioning a proportionate minimum sentence that exceeds the guidelines recommendation, a trial court must justify why it chose the particular degree of departure. The court must explain why the substantial and compelling reason or reasons articulated justify the minimum sentence imposed.
>
> "(6) It is appropriate to justify the proportionality of a departure by comparing it against the sentencing grid and anchoring it in the sentencing guidelines. The trial court should explain why the substantial and compelling reasons supporting the departure are

> similar to conduct that would produce a guidelines-range sentence of the same length as the departure sentence.
>
> "(7) Departures from the guidelines recommendation cannot be assessed with mathematical precision. The trial court must comply *reasonably* with its obligations under the guidelines . . . to further the legislative goal of sentencing uniformity." *Smith*, *supra* at 317-319.

The principle of proportionality applies when determining the extent of a departure from the recommended Guideline range. See *People v Hegwood*, 465 Mich 432, 437 n 10 (2001), which modified the holding in *Babcock I*, *supra*, as follows:

> "The Court of Appeals indicated in *Babcock* that the principle of proportionality is not part of the legislative guidelines, and that there will be no appellate review of sentence length in cases in which there is a substantial and compelling reason to depart from the recommended minimum stated in the legislative guidelines. . . . In this regard, however, we observe that the statute provides, 'A court may depart from the appropriate sentence range established under the [guidelines] if the court has a substantial and compelling reason for that departure . . . .' (Emphasis supplied.) MCL 769.34(3). In light of such language, we do not believe that the Legislature intended, in every case in which a minimal upward or downward departure is justified by 'substantial and compelling' circumstances, to allow unreviewable discretion to depart as far below or as far above the guideline range as the sentencing court chooses. Rather, the 'substantial and compelling' circumstances articulated by the court must justify the *particular* departure in a case, i.e., 'that departure.'" [Emphasis in original.]

See also *People v Babcock (Babcock II)*, 250 Mich App 463, 468-469 (2002) ("*Hegwood* indicates that the principle of proportionality can be considered concerning the extent of a departure.")

For sentencing requirements involving "intermediate sanction" ranges under the Guidelines, see *People v Stauffer*, 465 Mich 633 (2002) (if the recommended minimum range under the "intermediate sanction" statute is 18 months or less, a trial court cannot sentence a defendant to prison, unless it gives "substantial and compelling" reasons).

*MCL 771.1(d) and MCL 769.31(c).

In *People v Babcock (Babcock III)*, 469 Mich 247 (2003), the Michigan Supreme Court issued its first comprehensive interpretation of the legislative sentencing guidelines. In *Babcock*, the trial court made a downward departure from the sentencing guidelines. The prosecutor appealed, and in *People v Babcock (Babcock II)*, 250 Mich App 463 (2002), the Court of Appeals affirmed the sentence indicating that although some factors cited by the trial court were not objective and verifiable, the trial court did not abuse its discretion by departing from the guidelines. The prosecutor filed an application for leave to appeal. The Supreme Court granted leave and concluded*:

> "[T]he Court of Appeals concluded that some of the reasons articulated by the trial court were not objective and verifiable. As explained above, if a reason is not objective and verifiable, it cannot constitute a substantial and compelling reason. As also explained above, if the trial court articulates multiple reasons, and the Court of Appeals, as in this case, determines that some of these reasons are substantial and compelling and some are not, and the Court of Appeals is unable to determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons, the Court must remand the case to the trial court for resentencing or rearticualtion. Because the Court of Appeals in this case did not determine whether the trial court would have departed, and would have departed to the same degree, absent consideration of the reasons that the Court of Appeals found to be not objective and verifiable, we reverse its judgment and remand this case to the Court of Appeals for further consideration." [Footnotes omitted.] *Babcock III*, *supra* at 270.

*Justices Markman, Kelly, and Taylor signed the lead opinion. Chief Justice Corrigan concurred in part and dissented in part, as explained below, and Justice Young signed the Chief Justice's opinion. Justice Cavanagh and Justice Weaver also concurred in part and dissented from the majority's requirement that the factors allowing for departure be "objective and verifiable."

In order to assist the bench and bar, the Supreme Court included an appendix to the opinion.* The appendix summarizes the responsibilities of the trial court and the Court of Appeals under the statutory sentencing guidelines as follows:

> "1. A trial court is required to choose a minimum sentence within the guidelines range, unless there is a substantial and compelling reason for departing from this range. MCL 769.34(2), (3).
>
> "2. If a trial court's sentence is within the guidelines range, the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence. MCL 769.34(10).
>
> "3. A substantial and compelling reason must be 'objective and verifiable'; must "'keenly' or 'irresistibly' grab our attention"; and must be "of 'considerable worth' in deciding the length of a sentence.'" [*People v*] *Fields*, [448 Mich 58, 62, 67 (1995)].
>
> "4. A trial court must articulate on the record a substantial and compelling reason for its *particular* departure, and explain why this reason justifies that departure. MCL 769.34(3); *People v Daniel*, 462 Mich 1, 9; 609 NW2d 557 (2000).
>
> "5. A trial court 'shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight.' MCL 769.34(3)(b).
>
> "6. In considering whether, and to what extent, to depart from the guidelines range, a trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate criminal sentence than is available within the guidelines range. MCL 769.34(3).
>
> "7. In reviewing sentencing decisions, the Court of Appeals may not affirm a sentence on the basis that, although the trial court did not articulate a substantial and compelling reason for a departure, one nonetheless exists in the judgment of the Court of Appeals. Instead, in such a situation, the Court of Appeals must remand the case to the

*The Court of Appeals has stated that "[b]ecause a majority of the justices writing separately concurred with most of the lead opinion except one or two parts specifically stated in those separate opinions, we conclude that a majority of justices concurred with the appendix. Thus, the appendix is binding law." *People v Lowery,* 258 Mich App 167, 169 n 3 (2003).

trial court for resentencing. MCL 769.34(3); MCL 769.34(11).

"8. If a trial court articulates multiple 'substantial and compelling' reasons for a departure from the guidelines, and the Court of Appeals determines that some of these reasons are substantial and compelling and others are not, the panel must determine whether the trial court would have departed, and would have departed to the same degree, on the basis of the substantial and compelling reasons alone. MCL 769.34(3).

"9. If a trial court departs from the guidelines range, and its sentence is not based on a substantial and compelling reason to justify the *particular* departure, i.e., the sentence is not proportionate to the seriousness of the defendant's conduct and his criminal history, the Court of Appeals must remand to the trial court for resentencing. MCL 769.34(11).

"10. ''[T]he existence or nonexistence of a particular [sentencing] factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error.'' *Babcock I,* [244 Mich App 64, 75-76 (2000)], quoting [*People v*] *Fields*, [448 Mich 58, 77 (1995)].

"11. ''The determination that a particular [sentencing] factor is objective and verifiable should be reviewed by the appellate court as a matter of law.'' *Babcock I,* [244 Mich App 64, 76 (2000)], quoting [*People v*] *Fields*, [448 Mich 58, 78 (1995)].

"12. ''A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion.'' *Babcock I,* [244 Mich App 64, 76 (2000)], quoting [*People v*] *Fields*, [448 Mich 58, 78 (1995)]. An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Id.* at 272–274.

Chief Justice Corrigan dissented from the majority's requirement that the Court of Appeals remand a case to the trial court "if the trial court articulates multiple reasons [for departure], and the appellate court . . . determines that some of these reasons are substantial and compelling and some are not, and the Court of Appeals is unable to determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling

reasons . . . ." *Babcock III*, *supra* at *271*. This requirement may force the Court of Appeals to remand a large number of cases to the trial courts for resentencing or rearticulation. In an effort to mitigate the number of cases that would be remanded, Chief Justice Corrigan strongly urges that every trial judge add the following disclaimer to every judgment of sentence that departs from the guidelines:

> "I am persuaded that the defendant should serve the sentence I have rendered and it is my intention that this sentence be sustained if an appellate court determines that any of my rationales for departure survive review." *Id.* at 278.

The following sentencing guideline offense variables are often relevant (and scored) in sexual assault cases:

- OV 1—Aggravated Use of a Weapon, MCL 777.31.
- OV 2—Lethal Potential of the Weapon Possessed, MCL 777.32.
- OV 3—Physical Injury to Person, MCL 777.33.
- OV 4—Psychological Injury to a Victim, MCL 777.34.
- OV 5—Psychological Injury to a Member of a Victim's Family, MCL 777.35.
- OV 6—Intent to Kill or Injure Another Individual, MCL 777.36.
- OV 7—Aggravated Physical Abuse, MCL 777.37.
- OV 8—Victim Asportation or Captivity, MCL 777.38.
- OV 9—Number of Victims, MCL 777.39.
- OV 10—Exploitation of a Vulnerable Victim, MCL 777.40.
- OV 11—Criminal Sexual Penetration, MCL 777.41.

> **Note:** The Court of Appeals has held that, in scoring multiple sexual penetrations in CSC cases, the Legislature intended to bar the "use of only the one sexual penetration that forms the basis of a [CSC-I or CSC-III] conviction, when that offense is itself the sentencing offense. All other sexual penetrations of the victim and by the offender 'arising out of the sentencing offense' may be scored under MCL 777.41(2)(a), regardless of whether the sexual penetrations result in separate convictions." *People v Mutchie*, 251 Mich App 273 (2002).
>
> The Court of Appeals in *People v McLaughlin*, 258 Mich App 635, 676 (2003), held that trial courts are prohibited from assigning points under OV 11 for the one penetration that forms the basis of a first- or third-degree CSC conviction that constitutes the sentencing offense, but are directed to score points for any additional penetrations that

did not form the basis of the sentencing offense. In *McLaughlin*, the defendant was convicted of three counts of first-degree CSC. For each conviction, the trial court scored 50 points under OV 11 for the two criminal sexual penetrations forming the basis of the other two convictions. The defendant objected to the scoring of OV 11 and indicated that MCL 777.41(2)(c) prohibits a scoring of points for the penetration that forms the basis of *an* offense. The Court of Appeals upheld the scoring indicating that scoring 50 points for a defendant's conviction of first-degree CSC was appropriate where the defendant is also convicted of two other first-degree CSC charges arising out of the same assault. *McLaughlin, supra* at 676.

In the absence of any evidence that the defendant's criminal conduct on one occasion arose from his conduct on another occasion, when a defendant is sentenced for more than one conviction of first-degree criminal sexual conduct (CSC-1) and the penetrations forming the basis of each conviction occurred on different dates, those penetrations may not be counted when scoring OV 11 for any of the defendant's CSC-1 convictions. *People v Johnson*, 474 Mich 96, 102 (2006).

- OV 12—Contemporaneous Felonious Criminal Acts, MCL 777.42.
- OV 13—Continuing Pattern of Criminal Behavior, MCL 777.43.
- OV 14—Offenders Role in Multiple Offender Situation, MCL 777.44.
- OV 16—Property Obtained, Damaged, Lost or Destroyed, MCL 777.46.
- OV 19—Interference with the Administration of Justice, MCL 777.49.

C. Second or Subsequent CSC Convictions

*MCL 750.520a et seq. See Chapter 2 for further information on the CSC Act.

The Criminal Sexual Conduct Act* mandates imposition of a minimum sentence of *at least* five years where the defendant is convicted of a second or subsequent offense under MCL 750.520b (CSC-I), MCL 750.520c (CSC-II), or MCL 750.520d (CSC-III). MCL 750.520f. Although the defendant's second or subsequent conviction must be under CSC-I, CSC-II, or CSC-III, the prior conviction may be under CSC-I, CSC-II, or CSC-III, or under any similar federal statutes or any state statute for a similar-in-kind criminal sexual offense, including rape, carnal knowledge, indecent liberties, gross indecency, or any attempts to commit such offenses.

MCL 750.520f provides:

> "(1) If a person is convicted of a second or subsequent offense under section 520b, 520c, or 520d [CSC-I, CSC-II, or CSC-III], the sentence imposed under those sections for the second or subsequent offense shall provide for a mandatory minimum sentence of at least 5 years.
>
> "(2) For purposes of this section, an offense is considered a second or subsequent offense if, prior to conviction of the second or subsequent offense, the actor has at any time been convicted under section 520b, 520c, or 520d or under any similar statute of the United States or any state for a criminal sexual offense including rape, carnal knowledge, indecent liberties, gross indecency, or an attempt to commit such an offense."

Note: Under subsection (2), it is unclear whether the language permits use of prior Michigan convictions for only CSC-I, CSC-II, and CSC-III, or whether it also includes prior Michigan convictions for rape, carnal knowledge, indecent liberties, gross indecency, or convictions of similar in-kind criminal sexual offenses, including attempts to commit such offenses. No published Michigan appellate opinion has addressed this precise issue. However, for an unpublished opinion that used principles of statutory construction to conclude that a Michigan conviction for assault with intent to commit sexual penetration satisfied MCL 750.520f(2), see *People v Polderdyk*, unpublished opinion per curiam of the Court of Appeals, decided May 21, 1996 (Docket No. 180185).

The Criminal Sexual Conduct Act mandates a sentence of life imprisonment without the possibility of parole for a defendant aged 17 or older convicted of CSC-I against a victim under the age of 13 when the defendant has a previous conviction under MCL 750.520b, 520c, 520d, 520e, or 520g involving a victim under the age of 13. MCL 750.520b(2)(c). A sentence imposed under MCL 750.520b may be made consecutive to any term of imprisonment imposed for any other offense arising from the same transaction. MCL 750.520b(3).

Concurrent application of MCL 750.520f and the habitual offender statutes is permitted. *People v VanderMel*, 156 Mich App 231, 236 (1986). The habitual offender statutes address *maximum* possible sentences, while the second or subsequent provisions of MCL 750.520f address *minimum* sentences. *VanderMel*, *supra* at 234-235.

The same predicate felony may be used to support both the habitual offender charge and the charge under MCL 750.520f. *People v James*, 191 Mich App 480, 482 (1991).

Note: In *James*, the Court of Appeals expanded the holding in *VanderMel*, *supra*, to encompass situations in which the same predicate felony may be used to support both the habitual offender statutes and MCL 750.520f. *James*, *supra* at 482. In *VanderMel*,

the holding was expressly limited "to situations where the prior conviction underlying the habitual offender charge is not the same prior conviction which supports the charge under MCL 750.520f." *VanderMel*, *supra* at 237 n 7.

*MCL 769.10 et seq.

Unlike the Habitual Offender Act,* discussed in the next subsection, no filing of a supplemental information is required under MCL 750.520f. *People v Bailey*, 103 Mich App 619, 627 (1981). See also *People v Williams*, 215 Mich App 234, 236 (1996) ("Whenever sentence enhancement is authorized, due process does not require that the prosecution separately charge the defendant as a second offender, nor is the defendant entitled to an adversarial hearing before the prior convictions are used for sentencing purposes. . . . [D]ue process is satisfied as long as the sentence is based on accurate information and the defendant has a reasonable opportunity at sentencing to challenge that information.")

D. Habitual Offender Statutes

*A "felony" is "a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense that is expressly designated by law as a felony." MCL 761.1(g). See also *People v Williams*, 243 Mich App 333, 335 (2000).

The Habitual Offender Act, MCL 769.10 et seq., permits alternate sentencing for felony offenders who have been previously convicted of one, two or more, or three or more "felony"* offenses. The habitual offender statutes may be used concurrently with the Criminal Sexual Conduct Act's second or subsequent conviction provision, MCL 750.520f, discussed in the preceding subsection. *People v VanderMel*, 156 Mich App 231, 236 (1986).

When counting prior felonies under Michigan's habitual offender statutes, each felony conviction that preceded the sentencing offense is a separate felony conviction, even if more than one conviction arose from the same criminal transaction. *People v Gardner*, 482 Mich 41, 44 (2008). In *Gardner*, *supra* at 53-62, the Michigan Supreme Court rejected its previous method, set out in *People v Preuss*, 436 Mich 714 (1990), and *People v Stoudemire*, 429 Mich 262 (1987) (modified by *Preuss*, *supra* at 739), of counting multiple felonies that arose from the same criminal incident or transaction as a single felony. The Court explained that the plain language of the habitual offender statutes, MCL 769.10-769.13, "directs courts to count each separate felony conviction that preceded the sentencing offense, not the number of criminal incidents resulting in felony convictions." *Gardner*, *supra* at 44.

The Habitual Offender Act is generally divided into categories, based upon the number of prior convictions:

1. One Prior Felony Conviction (2nd Offense)

Under MCL 769.10, a person previously convicted of a **felony**, or an attempt to commit a felony, whether the conviction occurred in this state or would have been a felony or attempt to commit a felony in this state if obtained in this state, must be punished upon conviction for the subsequent felony as follows:

- If the subsequent felony is punishable upon a first conviction by a **term less than life**, the court, except as provided in this statute or MCL 771.1(1) (probation), may place the person on probation or sentence the person to imprisonment for a maximum term of not more than **one and a half times** the longest term prescribed for a first conviction for that offense or for a lesser term.

- If the subsequent felony is punishable upon a first conviction by imprisonment for **life**, the court, except as provided in this statute or MCL 771.1 (probation), may place the person on **probation** or sentence the person to **imprisonment for life or for a lesser term**.

- A defendant's maximum sentence may not be less than the maximum sentence for a first conviction of the sentencing offense. MCL 769.10(2).

  Note: Effective January 9, 2007, 2006 PA 655 amended the habitual offender statutes to specify that an habitual offender's maximum sentence must not be less than the maximum sentence authorized for a first conviction of the offense.

2. Two or More Prior Felony Convictions (3rd Offense)

Under MCL 769.11, a person previously convicted of any combination of **two or more felonies** or attempts to commit felonies, whether the convictions occurred in this state or would have been felonies or attempts to commit felonies in this state if obtained in this state, must be punished upon conviction for the subsequent felony as follows:

- If the subsequent felony is punishable upon a first conviction by a **term less than life**, the court, except as provided in this statute or MCL 771.1(1) (probation), may sentence the person to imprisonment for a maximum term of not more than **twice the longest term** prescribed for a first conviction for that offense or for a lesser term.

- If the subsequent felony is punishable upon a first conviction by imprisonment for **life**, the court, except as provided in this statute or MCL 771.1 (probation), may sentence the person to imprisonment for **life or for a lesser term**.

- A defendant's maximum sentence may not be less than the maximum sentence for a first conviction of the sentencing offense. MCL 769.11(2).

  Note: Effective January 9, 2007, 2006 PA 655 amended the habitual offender statutes to specify that an habitual offender's maximum sentence must not be less than the maximum sentence authorized for a first conviction of the offense.

3. Three or More Prior Felony Convictions (4th Offense)

Under MCL 769.12, a person previously convicted of any combination of **three or more felonies** or attempts to commit felonies, whether the convictions occurred in this state or would have been felonies or attempts to commit felonies in this state if obtained in this state, must be punished upon conviction for the subsequent felony as follows:

- If the subsequent felony is punishable upon a first conviction by imprisonment for a **maximum term of five years or more or life**, the court, except as provided in this statute or MCL 771.1(1) (probation), may sentence the person to imprisonment for **life** or a lesser term.

- If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term that is **less than five years**, the court, except as provided in this statute or MCL 771.1, may sentence the person to imprisonment for **not more than 15 years**.

- A defendant's maximum sentence may not be less than the maximum sentence for a first conviction of the sentencing offense. MCL 769.12(2).

  Note: Effective January 9, 2007, 2006 PA 655 amended the habitual offender statutes to specify that an habitual offender's maximum sentence must not be less than the maximum sentence authorized for a first conviction of the offense.

If the sentence imposed is for imprisonment for any term of years, a court must fix the length of both the minimum and maximum sentence within any specified limits in terms of years or fractions of a year; any such sentence shall be considered an indeterminate sentence. See MCL 769.10(2); MCL 769.11(2); and MCL 769.12(2).

Under MCL 769.12(4)(a)-(b), a prisoner sentenced under the foregoing second-, third-, or fourth-offender statutes* is not eligible for parole until expiration of the following:

*Except sentences for major controlled substance offenses. MCL 769.12(4).

> (a) For a prisoner not subject to disciplinary time, the minimum term fixed by the sentencing judge at the time of sentence, unless the sentencing judge or a successor gives written approval for parole at an earlier date authorized by law.
>
> (b) For a prisoner subject to disciplinary time, the minimum term fixed by the sentencing judge.

A court may impose a minimum sentence of probation in cases where the defendant could have been sentenced to probation upon conviction of the underlying offense. *People v Coffee*, 151 Mich App 364, 368, 375 (1986).

The rule espoused in *People v Tanner*, 387 Mich 683 (1972), that the minimum sentence imposed on indeterminate sentences may not exceed two-thirds of the maximum sentence, applies to sentences imposed under the habitual offender statutes. *People v Wright* 432 Mich 84, 93-94 (1989).

MCL 769.13 provides a strict 21-day limit for filing habitual offender notices (a notice of intent to be filed with the court and served upon the defendant within 21 days after arraignment on the warrant or, if arraignment is waived, within 21 days after filing of the information charging the underlying offense). No exceptions are contained in this statute for investigating undiscovered out-of-state convictions. *People v Morales*, 240 Mich App 571 (2000).

E. Probation

This section addresses probation orders,* and includes discussion on the types of offenses subject to probation, the maximum periods of probation, the contents of probation orders, the required findings that a court must make before issuing probation orders, and delayed sentencing.

*For information on juvenile offenders and dispositional options, see MCR 5.943(E)(1) and MCL 712A.18. See also Chapter 10, Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (Revised Edition)* (MJI, 2003).

1. A Privilege, Not a Right

Probation is a privilege, not a right. See *People v Flaherty*, 165 Mich App 113, 124 (1987); and *People v Lemon*, 80 Mich App 737, 742 (1978). Accordingly, granting probation rests within the sound discretion of the court. *People v Terminelli*, 68 Mich App 635, 637 (1976).

2. Probationable Offenses; Exceptions

In terms of sex offenses, MCL 771.1(1) permits probation upon conviction for all felony and misdemeanor offenses detailed in Chapters 2 and 3 of this Benchbook, except convictions for CSC-I, MCL 750.520b, and CSC-III, MCL 750.520d.* For information on concerns regarding incarceration under CSC-I and CSC-III offenses, see Sections 2.2(A)(4) and 2.2(B)(4).

*MCL 771.1(1) also precludes probation for murder, treason, armed robbery, and major controlled substance offenses.

Note: "Felony" is defined under the Code of Criminal Procedure as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(g). "Misdemeanor" is defined under the Code of Criminal Procedure as "a violation of a penal law of this state that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine." MCL 761.1(h).

Except for the non-probationable offenses in MCL 771.1 and as otherwise provided by law, and subject to the requirements of MCL 771.2a(6)–(11), an individual convicted of a "listed offense" may be placed on probation "for any term of years but not less than 5 years." MCL 771.2a(5).*

*Effective January 1, 2006. 2005 PA 126. See Section 11.2(A)(2) for a description of "listed offenses."

3. Required Findings by Court Before Placing Defendant on Probation

Under MCL 771.1(1), a defendant may be placed on probation only if the court makes the following two determinations:

- That defendant is not likely again to engage in an offensive or criminal course of conduct.
- That the public good does not require defendant to suffer the penalty imposed by law.

4. Maximum Duration of Probation For Sex Crimes

MCL 771.2(1) and MCL 771.2a(1)-(2) create three maximum probationary periods, all of which are based upon the type of convicted offense.* These maximum probationary periods, along with the applicable criminal offenses, are listed below:

*MCL 771.2(3) also establishes lifetime probation for convictions for major controlled substance violations (including conspiracy to commit such violations).

- Any term of years but not less than five years
  - Aggravated stalking, MCL 750.411i. (The sentence is subject to the probation conditions set forth in MCL 750.411i(4)). MCL 771.2a(2).
  - Any of the "listed offenses" (except as otherwise provided by law, and subject to the requirements of MCL 771.2a(6)–(11)).*
- Five-year maximum
  - All felonies, except major controlled substance offenses (and conspiracy to commit such offenses) and aggravated stalking, MCL 750.411i. MCL 771.2(1).
  - Stalking, MCL 750.411h. (The sentence is subject to the probation conditions set forth in MCL 750.411h(3)). MCL 771.2a.
  - Third- and fourth-degree child abuse, MCL 750.136b(5) and (6).
- Two-year maximum
  - All misdemeanors, except stalking, MCL 750.411h, and third- or fourth-degree child abuse, MCL 750.136b(5) and (6). MCL 771.2(1); MCL 771.2a(3).

*Effective January 1, 2006. 2005 PA 126. See Section 11.2(A)(2) for a description of "listed offenses."

For a definition of "felony" and "misdemeanor," see the note in Section 9.5(E)(2).

5. Contents of Probation Orders

Under MCL 771.3(1), probation orders must include the following conditions:

- The probationer shall not violate any criminal law of any jurisdiction in the U.S. during the term of probation.
- The probationer shall not leave the state without the court's consent during the term of probation.
- The probationer shall report to the probation officer as required by the officer.
- The probationer shall pay certain fees listed in the statute, restitution to the victim or victim's estate and the minimum state cost prescribed by MCL 769.1j.
- The probationer shall comply with the Sex Offender's Registration Act (SORA), MCL 28.721 et seq.,* if the registration under SORA is required.

*See Section 11.2 for more information on SORA.

Additionally, criminal courts have discretion to impose one or more conditions listed in MCL 771.3(2), as follows:

- Imprisonment up to 12 months in the county jail.
- Payment of a fine, costs, and/or assessments; payment may be made by wage assignment.
- Payment of restitution to the victim; payment may be made by wage assignment.
- Performance of community service.
- Participation in substance abuse or mental health treatment or counseling.
- Participate in a drug treatment court. Note, however, that persons charged with or who have pled guilty to "criminal sexual conduct of any degree" are ineligible for drug treatment court. MCL 600.1060(g)(*i*) and MCL 600.1064(1).
- Participation in a community corrections program.
- House arrest.
- Electronic monitoring. See Section 5.6 on tethering concerns.
- Participation in a residential probation program.
- Participation in a program of incarceration in a special alternative incarceration unit.

- Any conditions reasonably necessary for the protection of one or more named persons.*

- Complete his or her high school education or obtain the equivalency of a high school education in the form of a general education development (GED) certificate.

*A victim may also petition for a personal protection order. For information on PPOs, see Lovik, *Domestic Violence: A Guide to Civil & Criminal Proceedings* (MJI, 2d ed, 2001), Chapter 6.

> **Note:** In addition to the foregoing conditions, a court may impose "other lawful conditions of probation as the circumstances of the case require or warrant or as in its judgment are proper." MCL 771.3(4). Probation conditions for the protection of named persons are entered into the Law Enforcement Information Network (LEIN). MCL 771.3(5). Upon violation of a probation condition, the offender is subject to warrantless arrest. MCL 764.15(1)(g). An individual who violates a condition of probation is subject to revocation of probation in the court's discretion. MCL 771.4.

Conditions of probation involving "student safety zones." Additional conditions of probation must be ordered when an individual is placed on probation under MCL 771.2a(5) after conviction of a "listed offense."* Subject to the provisions in MCL 771.2a(7)–(11), discussed below, the court must order an individual placed on probation under MCL 771.2a(5) **not** to do any of the following:

*MCL 771.2a(6), effective January 1, 2006. 2005 PA 126. See Section 11.2(A)(2) for a description of "listed offenses."

- Reside within a student safety zone, MCL 771.2a(6)(a).

- Work within a student safety zone, MCL 771.2a(6)(b).

- Loiter within a student safety zone, MCL 771.2a(6)(c).

A "student safety zone" is defined as the area that lies 1,000 feet or less from school property. MCL 771.2a(12)(f).*

*Effective January 1, 2006. 2005 PA 126.

For purposes of MCL 771.2a, "school" and "school property" are defined in MCL 771.2a(12) as follows:

> "(d) 'School' means a public, private, denominational, or parochial school offering developmental kindergarten, kindergarten, or any grade from 1 through 12. School does not include a home school.
>
> "(e) 'School property' means a building, facility, structure, or real property owned, leased, or otherwise controlled by a school, other than a building, facility, structure, or real property that is no longer in use on a permanent or continuous basis, to which either of the following applies:
>
> "(*i*) It is used to impart educational instruction.
>
> "(*ii*) It is for use by students not more than 19 years of age for sports or other recreational activities."

Individuals exempted from probation under MCL 771.2a(5). Even if a person was convicted of a "listed offense," MCL 771.2a(11)* permits the court to exempt that person from being placed on probation under subsection (5) if either of the following circumstances apply:

*Effective January 1, 2006. 2005 PA 126.

> "(a) The individual has successfully completed his or her probationary period under [the youthful trainee act] for committing a listed offense and has been discharged from youthful trainee status.
>
> "(b) The individual was convicted of committing or attempting to commit a violation solely described in [MCL 750.520e(1)(a)*], and at the time of the violation was 17 years of age or older but less than 21 years of age and is not more than 5 years older than the victim."

*Fourth-degree CSC where the individual is at least 5 years older than the victim and the victim is at least 13 years of age but less than 16 years of age.

Exceptions to the mandatory probation conditions concerning "school safety zones." Under the circumstances described below, the prohibitions found in MCL 771.2a(6)(a)–(c) do not apply to individuals convicted of a "listed offense."

Residing within a student safety zone. The court shall not prohibit an individual on probation after conviction of a "listed offense" from residing within a student safety zone, MCL 771.2a(6)(a), if any of the following apply:*

*MCL 771.2a(7)(a)–(c), effective January 1, 2006. 2005 PA 126.

> "(a) The individual is not more than 19 years of age and attends secondary school or postsecondary school, and resides with his or her parent or guardian. However, an individual described in this subdivision shall be ordered not to initiate or maintain contact with a minor within that student safety zone. The individual shall be permitted to initiate or maintain contact with a minor with whom he or she attends secondary or postsecondary school in conjunction with that school attendance.
>
> "(b) The individual is not more than 26 years of age, attends a special education program, and resides with his or her parent or guardian or in a group home or assisted living facility. However, an individual described in this subdivision shall be ordered not to initiate or maintain contact with a minor within that student safety zone. The individual shall be permitted to initiate or maintain contact with a minor with whom he or she attends a special education program in conjunction with that attendance.
>
> "(c) The individual was residing within that student safety zone at the time the amendatory act that added this subdivision was enacted into law. However, if the individual was residing within the student safety zone at

> the time the amendatory act that added this subdivision was enacted into law, the court shall order the individual not to initiate or maintain contact with any minors within that student safety zone. This subdivision does not prohibit the court from allowing contact with any minors named in the probation order for good cause shown and as specified in the probation order."

*Effective January 1, 2006. 2005 PA 126.

In addition to above exceptions, the prohibition against residing in a student safety zone, MCL 771.2a(6)(a), does not prohibit a person on probation after conviction of a "listed offense" from "being a patient in a hospital or hospice that is located within a student safety zone." MCL 771.2a(8).* The hospital exception does not apply to a person who initiates or maintains contact with a minor in that student safety zone. *Id*.

*Effective January 1, 2006. 2005 PA 126.

Working within a student safety zone. If a person on probation under MCL 771.2a(5) was working within a student safety zone at the time the amendatory act adding these prohibitions was enacted into law, he or she cannot be prohibited from working in that student safety zone, MCL 771.2a(6)(b). MCL 771.2a(9).* If a person was working within a student safety zone at the time of this amendatory act, "the court shall order the individual not to initiate or maintain contact with any minors in the course of his or her employment within that safety zone." *Id*. As with MCL 771.2a(7)(c), for good cause shown, a court is not prohibited by MCL 771.2a(9) from allowing the probationer contact with any minors named in the probation order and as specified in the probation order. MCL 771.2a(9).

*Effective January 1, 2006. 2005 PA 126.

If an individual on probation under MCL 771.2a(5) only intermittently or sporadically enters a student safety zone for work purposes, the court shall not impose the condition in MCL 771.2a(6)(b) that would prohibit the person from working in a student safety zone. MCL 771.2a(10).* Even when a person intermittently or sporadically works within a student safety zone, he or she shall be ordered "not to initiate or maintain contact with any minors in the course of his or her employment within that safety zone." *Id*. For good cause shown and as specified in the probation order, the court may allow the person contact with any minors named in the order. *Id*.

6. Delayed Sentencing

*Exceptions exist for the following controlled substance offenses, which are not relevant here: MCL 333.7401(2)(a)(iv) and MCL 333.7403(2)(a)(iv).

A trial court may delay sentencing for "not more than 1 year" in an "action in which the court may place the defendant on probation."* MCL 771.1(2). Despite the foregoing language limiting delayed sentencing to actions "in which the court may place the defendant on probation," there is a split of authority on whether MCL 771.1(2) applies only to probationable offenses. For a case holding that MCL 771.1(2) applies to nonprobationable offenses (and thus allowing delayed sentencing for nonprobationable offenses), see *People v Bracey*, 124 Mich App 401, 407 (1983) (probation statute "does not forbid postponing sentencing for nonprobationable crimes"). For cases holding that MCL 771.1(2) applies only to probationable offenses, see *People v Stokes*, 422 Mich 863 (1985) (statute does not permit deferring sentence on

CSC-I charge); and *People v West*, 100 Mich App 498, 500-501 (1980) (trial court had no power to delay sentencing since defendant was convicted of armed robbery, one of the crimes excepted by the probation statute).

The purpose of delayed sentencing is to give the defendant an opportunity to prove "eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation, such as participation in a drug treatment court under . . . MCL 600.1060 to 600.1082."* MCL 771.1(2). Accordingly, reasonable conditions may be imposed on a defendant, such as no contact provisions and attending sex offender and alcohol treatment programs. See *People v Coleman*, 130 Mich App 639, 641 (1983); *People v Cannon*, 145 Mich App 100, 104 (1985); and *People v Harvey*, 146 Mich App 631 (1985). However, jail incarceration is not a permissible condition. *Cannon*, *supra*.

*Note, however, that persons charged with or who have pled guilty to "criminal sexual conduct of any degree" are ineligible for drug treatment court. MCL 600.1060(g)(*i*) and MCL 600.1064(1).

A sentence delayed more than one year does not necessarily deprive a court of jurisdiction; there must be a showing of good cause for the delay. *People v Dubis*, 158 Mich App 504, 506 (1987). Good cause will only be found in the "most limited and unusual of circumstances." See *People v Turner*, 92 Mich App 485, 489 (1979); and *People v McLott*, 70 Mich App 524, 530-531 (1976).

A defendant's consent to delay sentencing beyond one year constitutes a valid waiver of the one-year limitation. *People v Richards*, 205 Mich App 438, 445 (1994). However, compare *People v Dubis*, 158 Mich App 504 (1987) and *People v Turner*, *supra*, in which other panels of the Court of Appeals earlier held that a defendant's consent does not constitute waiver. (Although this conflict is seemingly resolved in favor of *Richards*, by MCR 7.215(I)(1), the rule governing conflicts between Court of Appeal's opinions, *Richards* distinguished *Turner* and *Dubis*, stating that defendant, unlike the defendants in *Turner* and *Dubis*, was incarcerated at the time he consented to the delay; see *Richards*, *supra* at 445 n 1.)

A circuit court delayed sentence order must include a provision that the department of corrections shall collect a supervision fee of not more than $135.00 multiplied by the number of months of delay ordered, but not more than 12 months. MCL 771.1(3).* This fee may be paid in monthly installments. *Id*.

*MCL 771.1 was amended by 2002 PA 483, effective October 1, 2002.

A trial court is not authorized under MCL 771.1(2) to dismiss a case over prosecution objection. See *People v Monday*, 70 Mich App 518, 522 (1976) (The statutory word "leniency" presupposes "some penalty" and does not mean "total forgiveness.")

A defendant has no right to a hearing for a violation of a condition of the delayed sentence. *Coleman*, *supra* at 642.

A delayed sentence impacts the victim as well as the defendant. If the victim requests, the prosecuting attorney or court must give notice to the victim of

any scheduled court proceedings and any changes in the schedule of court proceedings. See MCL 780.756(2) (felonies); MCL 780.816(2) (serious misdemeanors); and MCL 780.786(3) (juveniles). This requirement encompasses all court proceedings, including pretrial conferences, pre-and post-trial motion hearings, adjournments and continuances, and all schedule changes. See Miller, *Crime Victim Rights Manual* (MJI, 2001), Chapter 7, for more information on victim notice requirements.

F. Day Parole From Jail (Work, School, and Medical Release)

*See Section 5.6 for the application of the day parole statute in pre-trial release determinations.

Known as the day parole statute, MCL 801.251 permits the release of a person from jail during "necessary and reasonable hours" for work, school, or medical, psychological, and substance abuse treatment. However, MCL 801.251(1)-(2) imposes limitations upon release privileges for persons sentenced or committed* to jail for enumerated crimes. The enumerated crimes under MCL 801.251(2) are as follows:

- Child sexually abusive activity, MCL 750.145c.
- First-degree criminal sexual conduct, MCL 750.520b.
- Second-degree criminal sexual conduct, MCL 750.520c.
- Third-degree criminal sexual conduct, MCL 750.520d.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.
- Murder in connection with sexual misconduct.
- An attempt to commit any of the foregoing crimes.

*See MCL 801.251(3) for a definition of "jail."

Under MCL 801.251(1)-(2), persons sentenced or committed to county jail* for one of the foregoing enumerated crimes may be granted the privilege of leaving jail during "necessary and reasonable hours" only for the following medical or psychological reasons:

- Medical treatment.
- Substance abuse treatment.
- Mental health counseling.
- Psychological counseling.

Thus, under MCL 801.251(1)-(2), release is not permitted to attend work or school.

Under MCL 801.251(1), persons sentenced or committed to county jail for crimes other than the enumerated crimes listed in MCL 801.251(2) may be granted the privilege of leaving jail during "necessary and reasonable hours" for the following educational, occupational, and medical purposes:

- Seeking employment.
- Working at employment.
- Conducting a self-employed business or occupation, including housekeeping and caring for family needs.
- Attendance at an educational institution.
- Medical treatment, substance abuse treatment, mental health counseling, or psychological counseling.

No notice or hearing is required by the statute for revocation of day parole privileges. Moreover, in *People v Malmquist*, 155 Mich App 521, 523-526 (1986), the Court of Appeals found no due process violation for withdrawing, without notice or hearing, the defendant's work-release privileges after he reported to jail to begin his sentence with an impermissible blood-alcohol level. However, the Court of Appeals did note that defendant never commenced his work release privilege and therefore only had an "expectation of liberty" and did not have a "constitutionally protected liberty interest." *Id*. at 525-526.

G. Sex Offender Ineligibility for Custodial Incarceration Outside Prison and Jail

MCL 769.2a mandates the exclusion of sex offenders from community placement residence or work camp programs. *Jansson v Dep't of Corrections*, 147 Mich App 774, 776-780 (1985). Under MCL 769.2a, a person sentenced to imprisonment (or serving a sentence of imprisonment) for any of the following crimes is not eligible for custodial incarceration outside a state correctional facility or county jail:

- First-degree criminal sexual conduct, MCL 750.520b.
- Second-degree criminal sexual conduct, MCL 750.520c.
- Third-degree criminal sexual conduct, MCL 750.520d.
- Fourth-degree criminal sexual conduct, MCL 750.520e.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.
- Rape, MCL 750.520 (repealed by 1974 PA 266 and replaced with CSC Act, effective April 1, 1975).
- Murder in connection with sexual misconduct.
- An attempt to commit any of the foregoing crimes.

H. Sex Offender Treatment Programs

This subsection briefly discusses sex offender treatment programs. The intent of this subsection is to provide general background information on treatment programs, their goals, their general effectiveness (i.e., offender recidivism rates), and to discuss relevant legal issues that courts may have to consider when ordering sex offender treatment. A detailed discussion of sex offender treatment programs is beyond the scope of this Benchbook.

1. The Principal Types and Goals of Sex Offender Treatment

Most convicted sex offenders are managed by the criminal justice system through a combination of methods, including incarceration, parole, probation, and some form of specialized sex offender treatment. Sex offender treatment can be administered while the sex offender is incarcerated in jail or prison, or after he or she is released into the community (or both). About 60% of convicted sex offenders in the United States are under some form of conditional supervision in the community. Greenfeld, *Sex Offenses and Offenders* (Bureau of Justice Statistics, 1997), p vi. All sex offender treatment programs, i.e., therapeutic interventions for sex offenders, share the same goals: deterring (or reducing) subsequent victimization and protecting society. Schwartz, *The Sex Offender: Corrections, Treatment and Legal Practice* (Civic Research Institute, Vol I, 1995) p 20-2.

The National Institute of Justice explained sex offending and the aim of sex offender treatment programs as follows:

> "A 'cure' for sex offending is no more available than is a cure for epilepsy or high blood pressure. But use of a variety of interventions can help manage these disorders. A realistic objective of treatment is to provide sex offenders with the tools to manage their inappropriate sexual arousal and behavior. A therapist can, in many cases, teach offenders self-management by developing skills for avoiding high-risk situations through identification of decisions and events that precede them and through correction of their thought distortions. Treatment focuses on recognizing and managing deviant sexual behavior and offenders' thoughts and attitudes that promote it.
>
> "Research reveals that deviant thoughts and fantasies by sex offenders are precursors to sexual assault and, therefore, are an integral part of the assault pattern.
>
> "By instilling in offenders the dictum that deviant attitudes and fantasies reinforce deviant behavior and are not acceptable, treatment providers and supervising officers are prepared to intervene—set limits—at the incipient stages of reoffending patterns. Although such thoughts and

> feelings are not crimes, they are signals that constitute good reasons—based on empirical research and clinical experience—to increase supervision and 'tighten the reins' on an offender. This increased surveillance often results in detecting preassault behaviors that can be interrupted or, conversely, lead to revocation." English, Pullen & Jones, *Managing Adult Sex Offenders in the Community—A Containment Approach* (US Dep't of Justice, Nat'l Inst of Just, Jan 1997), p 5.

The majority of sex offender treatment programs in the United States use a combination of cognitive-behavioral treatment and relapse prevention techniques. *Myths and Facts About Sex Offenders* (Center for Sex Offender Management, August 2000), p 5-6. Cognitive-behavioral treatment, which is typically used on people with addictive behaviors (e.g., alcoholics and drug users), is also used on sex offenders by focusing on their sexual issues. It uses a technique called relapse prevention to minimize recidivism. Relapse prevention has three main goals:*

*See Schwartz, *supra*.

- To increase the sex offender's awareness and range of choices concerning his or her behavior.
- To develop specific coping skills and self-control capacities.
- To create a general sense of mastery or control over his or her life.

It is clear from these goals that the aim of relapse prevention is not to eliminate a sex offender's deviant desires:

> "If the [sex] offender believes that all treatment is successful only if it eradicates any vestige of deviant desires, the effects of a momentary loss of control may be devastating. In contrast, an offender who accepts that there are no 'cures' for sexual offenders and views lapses as opportunities to enhance self-management skills through inspection of acceptable mistakes, lapses may even give such an offender a more accurate perception of the need to be vigilant for the earliest signs of a relapse process." *The Sex Offender*, *supra* at 20-10.

The Center for Sex Offender Management identified the following monitoring tools in sex offender treatment programs that may assist in treatment and in reducing recidivism:

- Polygraph examinations.
- Use of the penile plethysmograph.

> **Note:** A penile plethysmograph is "a physiological instrument that measures [a male] offender's erectile response to various stimuli." *Id.*, *infra* at p 18. Because most sex offender treatment

> programs focus on "impulse" control and management, and not on eradicating sexually deviant thoughts, penile plethysmographs are sometimes deemed to have limited utility.

- Drug and alcohol testing.
- Electronic monitoring. Gilligan & Talbot, *Community Supervision of the Sex Offender: An Overview of Current and Promising Practices* (Center for Sex Offender Management, January 2000), p 17-19.

2. Sex Offender Recidivism

The United States Supreme Court recently wrote the following regarding sex offender treatment programs and sex offender recidivism:

> "Therapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism. See U.S. Dept. of Justice, Nat. Institute of Corrections, A Practitioner's Guide to Treating the Incarcerated Male Sex Offender xiii (1988) ('[T]he rate of recidivism of treated sex offenders is fairly consistently estimated to be around 15%,' whereas the rate of recidivism of untreated offenders has been estimated to be as high as 80%. 'Even if both of these figures are exaggerated, there would still be a significant difference between treated and untreated individuals')." *McKune v Lile*, 536 US 24 (2002).

It should be noted that studies vary considerably in their findings of recividism rates for sex offenders. This variability is caused in part by the variability in defining "recidivism." While "recidivism" is commonly understood to mean the "commission of a subsequent offense," some studies define it variously as a subsequent *arrest*, *conviction*, or *incarceration*. *Recidivism of Sex Offenders* (Center for Sex Offender Management, May 2001), p 2. Other factors leading to variability are the length of the follow-up period and the sample of sex offender types. *Id*. at 7.

3. A Sex Offender's Denial and Fifth Amendment Compelled Self-Incrimination Concerns

Most sex offenders deny or greatly minimize their criminal sexual behavior. See Schwartz & Cellini, *The Sex Offender: New Insights, Treatment Innovations and Legal Developments* (Civic Research Institute, Vol II, 1997), p 6-1 ("It is quite rare to find a sexual offender who is completely honest about his history of deviant behavior. Even after their legal battles have ended and they are presented with rewards for being honest (e.g., being placed on probation), many sexual offenders continue to deny having committed any offenses.") However, many if not most sex offender treatment programs require offenders to admit to committing prior sexual offenses before they are admitted into the program. This may raise legal issues regarding whether an

offender's admission of committing previous crimes is tantamount to compelled self-incrimination in violation of the Fifth Amendment.

The United States Supreme Court, in a plurality opinion with a fifth justice, O'Connor, J., concurring in the judgment, has recently held that a state prison sex offender treatment program that required sex offenders to admit responsibility for convicted offenses, including all other prior sexual activities, did not violate the respondent's Fifth Amendment right against compelled self-incrimination when it reduced his prison privileges and threatened to transfer him to a potentially more dangerous maximum-security facility. *Lile*, *supra*.

In *McKune*, the respondent was convicted and sentenced to prison in Kansas for rape, aggravated sodomy, and kidnapping. A few years before being released from prison, Kansas prison officials ordered him to participate in their Sexual Abuse Treatment Program (SATP). This program required respondent to admit responsibility, by signing a form, for all crimes for which he was sentenced, and to complete a sexual history form detailing all prior charged and uncharged criminal sexual activities. The respondent was informed that all such information was unprivileged and that Kansas would leave open the possibility of filing criminal charges in the future. Prison officials informed respondent that if he refused to participate, his privilege status would be reduced from Level III to Level I, which would curtail his visitation rights, earnings, work opportunities, ability to send money to family members, canteen expenditures, access to television, and other privileges. Respondent would also be transferred to a maximum-security unit, a potentially more dangerous environment, where he would be moved from a two-person to a four-person cell and his movements would be more limited. Respondent refused to participate in the SATP, claiming that the required disclosures would violate his Fifth Amendment privilege against self-incrimination. Respondent sought an injunction to prevent prison officials from withdrawing his privileges and transferring him to a different housing unit. The district court granted summary judgment for respondent. The Court of Appeals affirmed.

The United States Supreme Court reversed the judgment of the Court of Appeals, finding no compelled self-incrimination under the Fifth Amendment. The Supreme Court held that, although the privilege against self-incrimination does not terminate at the jailhouse door, Kansas' SATP does not compel prisoners to incriminate themselves in violation of the Constitution. After reviewing several precedents, four justices of the Supreme Court found the test enunciated in *Sandin v Conner*, 515 US 472, 484 (1995), to be useful for compelled self-incrimination, even though *Sandin* was a due process case. The standard is as follows: that to meet the compulsion standard, the prison conditions must constitute "atypical and significant hardship[s] on [inmates] in relation to the ordinary incidents of prison life." The Supreme Court held that the consequences stemming from respondent's invocation of the privilege—the demotion to Level III to Level I status, which curtailed his privileges, and the potential transfer to a more potentially maximum-security

facility—are not serious enough to constitute compulsion. Justice O'Connor concurred in the judgment because she felt that the alteration in respondent's prison conditions were "minor" and not so great as to constitute compulsion under the Fifth Amendment. However, Justice O'Connor wrote separately because she did not agree with using the "atypical and significant hardship" standard, which she felt should be broader in Fifth Amendment cases.

4. Castration (Surgical and Chemical)

Both surgical and chemical castration have been discussed as possible punishment for sex offenders. However, no federal or state published opinion has decided whether castration is cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution.

In Michigan, a trial court may not order a defendant to undergo what has been referred to as "chemical castration" as a condition of probation. In *People v Gauntlett*, 134 Mich App 737 (1984), modified 419 Mich 909 (1984), the Court of Appeals found that the trial court abused its discretion by imposing a condition of probation that defendant take Depo-Provera, a medroxyprogesterone acetate that lowers a man's level of testosterone, reduces his sex drive, and causes him to be temporarily impotent. *Id*. at 747-748. The Court of Appeals declined to decide the constitutional arguments made by defendant, instead holding that such a probationary condition was unlawful under the probation statute, MCL 771.3(4), because Depo-Provera treatments had not gained acceptance in the medical community as a safe and reliable medical procedure, and they were to be administered to the defendant involuntarily with no accompanying psychotherapy. Additionally, the Court found no statutory authorization for such treatment, and it took exception to the trial judge calling Depo-Provera treatments "chemical castration":

> "Although [the trial judge] crudely referred to Depo-Provera treatment as 'castration by chemical means', the therapy is neither castration nor sterilization. Nor should Depo-Provera treatment be thought to be within the ambit of numerous cases which discuss sterilization (or sometimes castration) of sex offenders because, in all cases where sterilization is allowed, the sanction is specifically authorized by statute. . . . It goes without saying that there is no statutory authorization in Michigan for treating sex offenders with medroxyprogesterone acetate." *Id*. at 748-749.

In *People v Walsh*, 459 Mich 987 (1999), the Michigan Supreme Court denied leave to appeal in a second-degree child abuse case in which the trial court ordered as a condition of probation that defendant use Norplant or Depo-Provera as a method of birth control. However, Justice Corrigan wrote separately to address the unlawfulness of the trial court's order of probation. Although she concurred in the decision to deny leave to appeal on the grounds of mootness (the defendant had decided to undergo a tubal ligation), Justice

Corrigan, based on the Court of Appeals' opinion in *Gauntlett*, *supra*, wrote that the condition of probation in the instant case was "clearly unlawful and invalid under MCL 771.3(4)." *Walsh*, *supra* at 988.

See also *In re R.B.*, 765 A2d 396, 400 (2000) (trial court abused its discretion in ordering juvenile to undergo an evaluation for chemical castration); and *State v Brown*, 326 SE2d 410, (1985) (castration as condition of suspension of sentence and probation was void, and also cruel and unusual punishment under South Carolina Constitution).

1. Trial Court's Consideration of Acquitted Charges When Considering Ordering Sex Offender Treatment

A trial court may consider other criminal activities established at trial even though a defendant was acquitted of those charges. *People v Compagnari*, 233 Mich App 233, 236 (1998). More specifically, a trial court may order a defendant to attend sex offender therapy, even when the defendant was acquitted of sex-related offenses but convicted of non-sex-related offenses. See *People v Gould*, 225 Mich App 79, 89 (1997), where the Court of Appeals, in a child abuse case, held that although a trial court may not make an independent finding of guilt and then sentence the defendant on that basis, it may consider evidence admitted at trial as an aggravating factor in determining an appropriate sentence.

A. Restitution

1. The Victim's Constitutional Right to Restitution

A crime victim's "right to restitution"* is preserved in Michigan's Constitution. Const 1963, art 1, §24.

*A detailed discussion of restitution is outside the scope of this Benchbook. For further information on restitution, see Miller, *Crime Victims Rights Manual* (MJI, 2001), Chapter 12.

2. Statutory Authority for Ordering Restitution

Restitution is generally authorized under numerous statutes, three of which are under the Crime Victim's Rights Act (CVRA), MCL 780.751 et seq.:

- MCL 780.766–780.767 (restitution under the felony article of the CVRA).
  - Under the felony article of the CVRA, MCL 780.766(2) requires a court to order restitution when sentencing a defendant convicted of a "crime." "Crime" is defined in MCL 780.752(1)(b) as an offense for which the offender, upon conviction, may be sentenced to imprisonment for more than one year, or an offense which is designated by law as a felony.
- MCL 780.826 (restitution under the misdemeanor article of the CVRA).

– Under the misdemeanor article of the CVRA, MCL 780.826(2) requires a court to order restitution when sentencing a defendant for a "misdemeanor." A "misdemeanor" is defined in MCL 780.826(1)(a) as "a violation of a law of this state or a local ordinance that is punishable by imprisonment for not more than 1 year or a fine that is not a civil fine, but that is not a felony."

♦ MCL 780.794–780.795 (restitution under the juvenile article of the CVRA).

– Under the juvenile article of the CVRA, MCL 780.794(2) requires a court to order restitution at the disposition or sentencing hearing for an "offense." An "offense" is defined in MCL 780.794(1)(a) as "a violation of a penal law of this state or a violation of an ordinance of a local unit of government of this state punishable by imprisonment or by a fine that is not a civil fine."

Additionally, the following provisions of the Code of Criminal Procedure, the Juvenile Code, and the Department of Corrections code deal generally with restitution:

♦ MCL 769.1a (restitution under the Code of Criminal Procedure);

♦ MCL 771.3(1)(e) (restitution as a condition of probation ordered for criminal defendants);

♦ MCL 712A.30-712A.31 (restitution in juvenile delinquency cases under the Juvenile Code); and

♦ MCL 791.236(5) (restitution as a condition of parole).

> **Note:** Victims of crimes for which restitution or other awards of compensation are unavailable may seek civil damages or compensation from the Crime Victims Services Commission (CVSC). For information on civil actions, see Chapter 10 generally. For more information on the CVSC and the Crime Victims Compensation Act, see Section 10.7 and Miller, *Crime Victims Rights Manual* (MJI, 2001), Chapter 11.

3. Restitution for Sexual Assault Evidence Collection Kits

A health care provider may not submit a bill for any portion of the costs of a sexual assault medical forensic examination, including the administration of a sexual assault evidence kit, to the victim of the sexual assault, including any insurance deductible or co-pay, denial of claim by an insurer, or any other out-of-pocket expense. MCL 18.355a(2).

A health care provider seeking payment for a sexual assault medical forensic examination must advise the victim, orally and in writing, that a claim will not be submitted to his or her insurance carrier without express written consent, and that he or she may decline consent if he or she believes that submitting a claim would substantially interfere with his or her personal privacy or safety. MCL 18.355a(3).

If reimbursement cannot be obtained from the victim's insurance or if insurance is not available, a health care provider may seek payment from the Crime Victim Services Commission (CVSC) and/or another entity. MCL 18.355a(4).

A health care provider that is reimbursed by a victim's insurance carrier or another entity may not submit any portion of the claim reimbursable by the insurance carrier or other entity to the CVSC. MCL 18.355a(5) and (6).

J. Sex Offenders Registration Act

Michigan's "Sex Offenders Registration Act," MCL 28.721 *et seq*., requires an individual "convicted" of a "listed offense," or an individual required to be registered as a sex or child offender in another state or country, to register as a sex offender if the individual meets the Act's residency requirements. For more information on the Act and its requirements, see Section 11.2. If an offender required to register under the Sex Offenders Registration Act willfully violates the Act, the parole board must revoke the offender's parole. MCL 791.240a(2).

Effective July 20, 2006, 2006 PA 316 amended MCL 791.240a to require revocation of a sex offender's parole under certain circumstances. If an offender required to register under the Sex Offenders Registration Act willfully violates the Act, the parole board must revoke the offender's parole. MCL 791.240a(2).

9.6 Post-Conviction Request for DNA Testing

A defendant serving a prison sentence for a felony,* if convicted of that felony at trial and *before* January 8, 2001, may petition the circuit court to order two kinds of relief: (1) DNA testing of biological material that was identified during the investigation that led to the defendant's conviction; and, (2) a new trial based on the results of the DNA testing. MCL 770.16(1). Effective January 6, 2009, all petitions must be filed no later than January 1, 2012. *Id*.

*A "felony" is defined as an offense expressly designated as a felony, or one where the offender is subjected to death or imprisonment for more than one year. MCL 761.1(g).

Under certain circumstances, a defendant convicted of a felony at trial *on or after* January 8, 2001, may also petition the court to order DNA testing of biological material identified during the investigation leading to his or her conviction, and for a new trial based on the results of that DNA testing. To petition the court, the defendant must show (1) that DNA testing was done in the case, (2) that the results were inconclusive, and (3) that current DNA technology is likely to yield conclusive results. MCL 770.16(1)(a)-(c).*

*2008 PA 410, effective January 6, 2009.

*2008 PA 410, effective January 6, 2009.

A petition under MCL 770.16 must allege that biological material was collected and identified during the investigation of the defendant's case. MCL 770.16(3).* If the defendant, after diligent investigation, is unable to discover the location of the identified biological material or to determine whether the biological material is no longer available, he or she may petition the court for a hearing to determine whether the identified biological material is available. *Id*. If the court determines that identified biological material was collected during the investigation, it must order appropriate police agencies, hospitals, or the medical examiner to search for the material and to report the results of the search to the court. *Id*.

MCL 770.16(1) does not limit requests for DNA testing to those cases in which the biological material *itself* led to the defendant's conviction; rather, MCL 770.16(1) simply requires that the biological material was identified *during the investigation* that led to the defendant's conviction. *People v Hernandez-Orta*, 480 Mich 1101 (2008) (*Hernandez-Orta II*).

In *Hernandez-Orta*, the defendant was convicted of first-degree criminal sexual conduct after a second trial. Semen samples were recovered from the victim at the time of the assault. *People v Hernandez-Orta*, unpublished opinion per curiam of the Court of Appeals, issued July 10, 2007 (Docket No. 267971), slip op p 1 (*Hernandez-Orta I*). The DNA evidence was admitted at the defendant's first trial, which resulted in a hung jury. At that time, the science of DNA evidence identified the defendant as "among [the] 58 percent of the population who could be the source of [the semen]." *Id*. at 3. Explaining that the DNA evidence did not tend to prove the defendant's guilt, the trial court excluded the DNA evidence from the defendant's retrial on relevancy grounds. *Id*. Several years after his conviction, the defendant filed a motion for biological testing of the evidence under MCL 770.16, and the trial court denied the motion. *Hernandez-Orta I*, *supra* at 3-4. The Court of Appeals affirmed the trial court's denial and stated:

> "The plain language of the statute at issue provides for later or further DNA testing where the DNA evidence in the investigation led to the conviction. That situation did not occur in the present case. Rather, this trial was premised on the credibility of the witnesses in light of the lack of scientifically certain evidence at that time." *Id*. at 6. (Internal citation omitted.)

In reversing the Court of Appeals, the Supreme Court explained that MCL 770.16(1) does not require that the biological material *itself* lead to the defendant's conviction; the biological material needs only to have been identified *during the investigation* that led to the conviction. *Hernandez-Orta II*, *supra* at 1101. The Court continued:

> "The defendant in this case has presented *prima facie* proof that 'the evidence sought to be tested is material to the issue of' his identity as the perpetrator under MCL 770.16(4)(a). If the DNA from semen found in the victim's body shortly after the assault

> does not match the defendant's DNA profile, this evidence has a tendency to show that defendant is not the perpetrator—particularly if the DNA also does not match that of the victim's boyfriend, with whom the victim acknowledged having sexual relations two days before the alleged offense." *Hernandez-Orta II*, *supra* at 1101.

The requirements for a new trial based on newly discovered evidence are as follows: the defendant must demonstrate that (1) the evidence itself, not merely its materiality, is newly discovered; (2) the evidence is not merely cumulative; (3) the evidence is likely to render a different result at a retrial; and (4) the defendant could not have been discovered and produced at trial despite reasonable diligence. *People v Cress*, 250 Mich App 110, 125 (2002), vacated in part on other grounds 466 Mich 882 (2002),* quoting *People v Lester*, 232 Mich App 262, 271 (1998).

*The Michigan Supreme Court in *Cress* vacated that portion of the Court of Appeals' opinion which directed the jury to decide the issue of whether evidence was destroyed in bad faith. Instead the Supreme Court found that such questions are to be decided by the trial judge. On remand, the circuit court found no evidence that the prosecutor's office acted in bad faith in destroying the evidence. *Cress, supra* at 690 n 4.

The Michigan Supreme Court granted the prosecutor's leave to appeal from the Court of Appeals' decision granting the defendant a new trial based on newly discovered evidence—a third party's confession to the crime for which the defendant was convicted. *People v Cress*, 467 Mich 889 (2002). The Michigan Supreme Court agreed with the trial court: the third party was not credible and his confession was likely false. *People v Cress*, 468 Mich 678, 695–696 (2003).

Citing to a pair of 1928 cases, the Court noted that "[a] false confession (i.e., one that does not coincide with established facts) will not warrant a new trial, and it is within the trial court's discretion to determine the credibility of the confessor." *Cress*, *supra* at 692, citing *People v Simon*, 243 Mich 489, 494 (1928); *People v Czarnecki*, 241 Mich 696, 699 (1928). Because the Court of Appeals erred in substituting its judgment for that of the trial judge with regard to the confessor's credibility, the Supreme Court reinstated the trial court's denial of the defendant's motion for a new trial.

The following subsections explore the requirements for ordering post-conviction DNA testing, including a discussion of the rights and duties established under MCL 770.16.

A. Requirements for Ordering DNA Testing

A defendant must meet all the following requirements under MCL 770.16(4) before the circuit court is compelled to order DNA testing:

- Present prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction.
- Establish all the following by clear and convincing evidence:
  - That a sample of biological material is available for DNA testing;

– That the identified biological material was not previously subjected to DNA testing or, if previously tested, will be subject to DNA testing technology that was not available when defendant was convicted; and,

– That the identity of defendant as the perpetrator of the crime was at issue during the trial.

In granting or denying a petition for DNA testing under MCL 770.16, a court must state its findings of fact on the record or make written findings of fact supporting its decision. MCL 770.16(5).

The meaning of the term "material" as used in MCL 770.16(4)(a) "means that the 'evidence sought to be tested' must be of some consequence to the issue of identity in the case." *People v Barrera*, 278 Mich App 730, 737 (2008).

In determining the materiality of DNA evidence under MCL 770.16(4)(a), a trial court is not permitted to weigh the DNA evidence against the evidence of identity admitted at trial. *Id*. at 741. In *Barrera, supra* at 737-738, the defendant (who had been convicted of three counts of CSC-I) sought to have the following items tested: a vaginal swab and vaginal smear collected from the victim immediately after the crime; the quilt on which the victim was sexually assaulted; and the shorts and panties the victim was wearing at the time she was sexually assaulted. The Court of Appeals found that the defendant demonstrated that all of the items were material to establishing the identity of the perpetrator of the rape, because he linked the items containing DNA evidence to both the crime *and* the criminal. *Id*. at 738-739.

B. Reviewing DNA Test Results and Motion for New Trial

1. Results Inconclusive or Show Defendant is Source

*See Section 11.4 on DNA identification profiling.

If the results of the DNA testing are inconclusive or show that defendant is the source of the identified biological material, the court must deny a defendant's motion for new trial. MCL 770.16(7). Additionally, if the DNA test results show defendant as the source of the identified biological material, the defendant's DNA profile must be provided to the department of State Police for inclusion under the DNA identification profiling system act.* *Id*.

2. Results Show Defendant Not Source; New Trial Requirements

If the results of the DNA testing show that defendant is not the source of the identified biological material, the court must, before it grants a new trial, appoint counsel pursuant to MCR 6.505(a) and hold a hearing to determine by clear and convincing evidence all the following:

- That only the perpetrator of the crime for which defendant was convicted could be the source of the biological material.

- That the identified biological material was not contaminated or so degraded that the DNA profile of the tested sample cannot be determined to be identical to the DNA profile of the initial sample collected during the investigation.

- That defendant's purported exclusion as the source of the biological material, balanced against the other evidence, is sufficient to justify the grant of a new trial. MCL 770.16(8)(a)-(c).

C. Prosecutor Right to Demand Retest; Stay of New Trial

Upon motion of the prosecutor, the court must order DNA retesting of the biological material and stay the defendant's motion for a new trial pending the results of the retest. MCL 770.16(9).

D. Prosecutor Must Inform Victim of Defendant's DNA Petition

If the victim's name is known, the prosecutor must send written notice of the defendant's DNA petition by first-class mail to the victim's last known address. MCL 770.16(11). Upon a victim's request, the prosecutor must also give the victim notice of the time and place of any hearing on the petition. Further, the prosecutor must inform the victim of the court's grant or denial of a new trial based on the petition. *Id*.

E. Venue; Service of Petition on Prosecuting Attorney

All post-conviction DNA petitions made under MCL 770.16 must be filed in the circuit court for the county in which the defendant was sentenced and assigned to the sentencing judge or his or her successor. MCL 770.16(2). Additionally, the DNA petition must be served on the prosecuting attorney for the county in which defendant was sentenced. *Id*.

F. Duty to Preserve Biological Material

The law enforcement agency that conducts the investigation into the crime for which the person may file a petition for DNA testing under MCL 770.16 is obligated to preserve all biological material identified during the investigation for the period of time that any person is incarcerated in connection with the case. MCL 770.16(12). The effective date of this specific provision is January 1, 2001. *Id.*

G. Authority of Court to Order Production of Laboratory Protocols, Procedures, and Records

Upon motion of either party, a court may order that the laboratory provide to the court and all parties copies of its testing protocols, procedures, notes, and other relevant records. MCL 770.16(6).

H. Indigent Defendants; Costs of DNA Testing Borne by State

The cost of DNA testing ordered under MCL 770.16 must be borne by the state if the court determines that the applicant is indigent. MCL 770.16(6).

9.7 Defendant's Post-Conviction Request For 25% Reduction in Jail Sentence

If approved by the court, a prisoner serving a sentence may receive a 25% reduction of the term of imprisonment if the prisoner's conduct, diligence, and general attitude merit such a reduction. MCL 801.257 provides as follows:

> "Except as providing in [MCL 801.5 (governing county jail contracts, private donations, reimbursements) and MCL 801.5a (governing prisoners refusing to cooperate with county reimbursement for medical care)], a prisoner may receive, if approved by the court, a reduction of 1/4 of his or her term if his or her conduct, diligence, and general attitude merit such reduction."

The reduction option provided in MCL 801.257 only applies to prisoners in county jails serving sentences not exceeding one year; it does not apply to state prison inmates. *People v Groff*, 204 Mich App 727, 730-731 (1994). This distinction between county prisoners and state prisoners is rationally based and does not violate the equal protection clause under the federal or state constitution. *Id.* at 732.

9.8 Parole

An offender sentenced to a term of years under MCL 750.520b(2)(b) for first-degree criminal sexual conduct (CSC-I) is eligible only for life parole. MCL 791.242(3). An offender granted life parole under MCL 791.242(3) remains subject to mandatory lifetime electronic monitoring under MCL 750.520n. MCL 750.520b(2)(d).

An offender convicted of CSC-I and sentenced to life imprisonment under MCL 750.520b(2)(b) is not eligible for parole. MCL 791.234(6)(e).

Where an offender is not already subject to lifetime electronic monitoring pursuant to MCL 750.520n, the parole board may require electronic monitoring when granting parole to an offender convicted of violating or conspiring to violate MCL 750.520b (CSC-I) or 750.520c (CSC-II). MCL 791.236(15). When an offender is subject to electronic monitoring under such circumstances, the monitoring is limited to the duration of the offender's parole. MCL 791.236(15)(a).

> **Note:** Lifetime electronic monitoring, MCL 791.285, was established by 2006 PA 172, effective August 28, 2006. Pursuant to MCL 791.285(3), "'electronic monitoring' means a device by which, through global positioning system satellite or other means, an individual's movement and location are tracked and recorded."

9.9 Setting Aside ("Expunging") Convictions

This section explores the requirements and procedures for setting aside or "expunging" convictions under MCL 780.621 et seq.

> **Note:** The setting aside and expungement of juvenile adjudications and records is governed by MCL 712A.18e and MCR 3.925(E). For more information on these matters, see Miller, Chapter 25, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (Revised Edition)* (MJI, 2003).

Except as stated below, a person convicted of "not more than 1 offense" may file an application* with the convicting court for entry of an order setting aside a conviction. MCL 780.621(1). The word "offense" applies to both felonies and misdemeanors. *People v Grier*, 239 Mich App 521, 523 (2000).

*See SCAO Form MC 227.

A person convicted of multiple offenses in a single proceeding is not eligible to have the convictions set aside; the statutory language of "not more than 1 offense" means "a single conviction for a single crime (crime being synonymous with offense) committed on a single occasion . . ." *People v McCullough*, 221 Mich App 253, 257 (1997). A person convicted of multiple offenses arising out of the same factual transaction is not eligible to have the convictions set aside. *People v Blachura*, 176 Mich App 717, 719 (1989). A person who has had a conviction successfully set aside may not have a subsequent conviction set aside. MCL 780.624.

Various statutory limitations exist for sex offenders convicted of specified offenses. For instance, MCL 780.621 et seq., precludes the setting aside of convictions for CSC-I, CSC-II, CSC-III, assault with intent to commit CSC (including attempts to commit such offenses), and all life-offense felonies (including attempts to commit such offenses). This ensures that a record of conviction will remain available for public viewing. See the next subsection for the list of specified offenses. Additionally, adult sex offenders who have their convictions set aside must still comply with the registration requirements

of the Sex Offenders Registration Act (SORA), MCL 28.721 et seq., if their convictions are "listed offenses" under SORA. MCL 780.622(3).

A. Offenses That May Not Be Set Aside

MCL 780.621(2) provides that a person shall not apply to have set aside, and a court shall not set aside, any of the following convictions:

- A felony for which the maximum punishment is life imprisonment.

  Note: Life-offense felonies listed in Chapters 2 and 3 of this Benchbook include CSC-I, MCL 750.520b, sexual delinquency, MCL 767.61a, and kidnapping, MCL 750.349.

- An attempt to commit a felony for which the maximum punishment is life imprisonment.

  Note: MCL 780.621(2) does not specifically prohibit the setting aside of other inchoate offenses, such as conspiracy, MCL 750.157a, and solicitation, MCL 750.157b.

- Second-degree criminal sexual conduct, MCL 750.520c.

- Third-degree criminal sexual conduct, MCL 750.520d.

- Assault with intent to commit criminal sexual conduct, MCL 750.520g.

- An attempt to commit any of the foregoing criminal sexual conduct offenses.

  Note: MCL 780.621(2) does not specifically prohibit the setting aside of other inchoate offenses, such as conspiracy, MCL 750.157a, and solicition, MCL 750.157b.

- A traffic offense, defined as a violation of MCL 257.1 to 257.923, or a local ordinance substantially corresponding to any such traffic offense. See MCL 780.621a(b).

B. Minimum Five-Year Waiting Period

An application to set aside a conviction may not be filed until five years has elapsed from the imposition of sentence for that conviction or five years from the completion of any term of imprisonment, whichever occurs later. MCL 780.621(3).

C. Contents of Application

MCL 780.621(4) provides that an application must be signed under oath and contain:

- The applicant's full name and current address.
- A certified record of the conviction to be set aside.
- A statement that the applicant has not been convicted of any other offense.
- A statement as to whether the applicant previously filed an application to set aside this or any other conviction and, if so, the application's disposition.
- A statement as to whether the applicant has any other criminal charge pending in any court in the United States or another country.
- A consent to the use of the nonpublic record held by the state police.

D. Submission of Application to State Police

Although the original application must be filed with the convicting court, the applicant must also submit a copy of the application and two sets of fingerprints to the State Police. MCL 780.621(5). The State Police compares the fingerprints to its records, including the nonpublic records, and forwards a set of the fingerprints to the Federal Bureau of Investigation for comparison with the records of that agency. The State Police then reports its findings to the convicting court; that court may not act upon the application until the State Police reports its findings.

A $50.00 application fee, payable to the state of Michigan, must accompany the copy of the application submitted to the State Police. MCL 780.621(6).*

*Amended by 2002 PA 472, effective October 1, 2002.

E. Submission of Application to Attorney General and Prosecuting Attorney; Notice to Victim

A copy of the application must be served upon the attorney general and, if applicable, the office of the prosecuting attorney that prosecuted the offense. MCL 780.621(7). The attorney general and prosecuting attorney have the opportunity to contest the application. *Id.*

If the conviction was for an "assaultive crime" or "serious misdemeanor," and the victim's name is known to the prosecuting attorney, the prosecuting attorney must notify the victim. MCL 780.621(7). Notice must be in writing, accompanied by a copy of the application, and sent "by first-class mail to the victim's last known address." See MCL 780.772a (assaultive crime); and MCL 780.827a (serious misdemeanor).* The victim has a right to appear at any proceeding concerning the conviction and to make a written or oral statement. MCL 780.621(7).

*See MCL 770.9a and Section 9.2(C) for a definition of "assaultive crime"; see MCL 780.811(1)(a)(i)-(xv) for a definition of "serious misdemeanor."

F. Court Action and Standard for Setting Aside Convictions

After the findings of the State Police are reported to the court, the court may require the filing of affidavits and the taking of such proofs as it considers proper. MCL 780.621(8).

Having a conviction set aside is a privilege and not a right. MCL 780.621(9). Under MCL 780.621(9), a court may set aside the conviction, if it determines both of the following:

- The circumstances and behavior of the applicant from the date of the applicant's conviction to the filing of the application warrant setting aside the conviction.
- Setting aside the conviction is consistent with the public welfare.

The nature of the offense, standing alone, is insufficient to warrant denial of setting aside a conviction; a court must balance the "circumstances and behavior" of the applicant against the "public welfare." See *People v Rosen*, 201 Mich App 621, 623 (1993); and *People v Boulding*, 160 Mich App 156, 158 (1986).

G. Effects and Entitlements of Granting Application

If the court grants the application and sets aside the sole conviction, the applicant shall be considered, for purposes of law, not to have been previously convicted, except as provided in MCL 780.622(2)-(6) as follows:

- The applicant is not entitled to the remission of any fine, costs, or other money paid as a consequence of a conviction that is set aside.
- If the conviction is a listed offense under the Sex Offenders Registration Act (SORA), the applicant is considered to have been convicted of that offense for purposes of SORA.
- This section does not affect the right of the applicant to rely upon the conviction to bar subsequent proceedings for the same offense.
- This section does not affect the right of a victim of a crime to prosecute or defend a civil action for damages.
- This section does not create a right to commence an action for damages for incarceration under the sentence that the applicant served before the conviction is set aside pursuant to this section.

H. Nonpublic Records; Maintenance and Accessibility

MCL 780.623 governs the maintenance of and access to nonpublic records of the state police. Once the court grants the application and sets aside the

conviction, the court must send a copy of the order to the arresting agency and the State Police. MCL 780.623(1).

The State Police must maintain a nonpublic record of any order setting aside a conviction and the record of arrest, fingerprints, conviction, and sentence of the applicant. MCL 780.623(2). Under MCL 780.623(2), this nonpublic record is available only to:

- A court of competent jurisdiction.
- An agency of the judicial branch of state government.
- A law enforcement agency.
- A prosecuting attorney.
- The attorney general.
- The governor.

Under MCL 780.623(2)(a)-(f), the nonpublic record must be made available to these persons and entities upon request, but only for the following reasons:

> "(a) Consideration in a licensing function conducted by an agency of the judicial branch of state government.
>
> "(b) To show that a person who has filed an application to set aside a conviction has previously had a conviction set aside pursuant to this act.
>
> "(c) The court's consideration in determining the sentence to be imposed upon conviction for a subsequent offense that is punishable as a felony or by imprisonment for more than 1 year.
>
> "(d) Consideration by the governor if a person whose conviction has been set aside applies for a pardon for another offense.
>
> "(e) Consideration by a law enforcement agency if a person whose conviction has been set aside applies for employment with the law enforcement agency.
>
> "(f) Consideration by a court, law enforcement agency, prosecuting attorney, or the attorney general in determining whether an individual required to be registered under the sex offenders registration act has violated that act, or for use in a prosecution for violating that act."

The applicant has a right to secure a copy of the nonpublic record upon payment of a fee to the State Police in the same manner as the fee presribed in MCL 15.234 (Freedom of Information Act). However, the nonpublic record maintained by the state police is exempt from disclosure under the Freedom of Information Act. MCL 780.623(3)-(4).

I. Pertinent Case Law

A person convicted of multiple crimes in a single proceeding is not eligible to have the convictions set aside; the statutory language of "not more than 1 offense" means "a single conviction for a single crime (crime being synonymous with offense) committed on a single occasion . . ." *People v McCullough*, 221 Mich App 253, 257 (1997). The word "offense" applies to both felonies and misdemeanors. *People v Grier*, 239 Mich App 521, 523 (2000).

A person convicted of multiple crimes arising out of the same factual transaction is not eligible to have the convictions set aside. *People v Blachura*, 176 Mich App 717, 719 (1989).

The expungement statute is remedial and may be applied retroactively. See *People v Link*, 225 Mich App 211, 218 (1997) (Defendant was precluded from expunging his CSC-III conviction even when the conviction and filing of the application for expungement occurred before the effective date of the statutory amendment that made CSC-III an ineligible offense).

A defendant sentenced to lifetime probation may not expunge the underlying conviction, unless the court reduces the sentence by a revocation of probation that results in imprisonment under MCL 771.3(9). See *People v Jones*, 217 Mich App 106, 108 (1996) and *People v Cohen*, 217 Mich App 75, 79-80 (1996).

An unconditional and absolute pardon of a person's previous convictions renders that person "innocent" as a matter of law and makes that person, under the plain language of MCL 780.621(1), eligible for expungement of a subsequent conviction as one "who is convicted of not more than one offense." See *People v Vanheck*, 252 Mich App 207 (2002) (trial court erred in concluding defendant was ineligible for expungement of his Michigan felonious assault conviction, since defendant received an unconditional and absolute pardon from the Connecticut Board of Pardons for his five previous misdemeanor convictions).

Requiring a sex offender's continued compliance with the Sex Offender Registration Act (SORA) and continuing to include the offender on the Public Sex Offender Registry (PSOR), even after the offender's conviction has been set aside under the Setting Aside Convictions Act (SACA), does not violate the offender's rights to Equal Protection or substantive due process. *Does II & III v Munoz*, 507 F3d 961, 965-967 (CA 6, 2007).

In *Does II & III*, the plaintiffs claimed that the SORA and the SACA violated their Equal Protection and substantive due process rights because the statutes treat persons convicted of sex offenses differently from persons convicted of other offenses. The Court employed rational basis review because the plaintiffs did not assert a fundamental right (the SACA creates an exception to the privacy of records for the PSOR, and there is no fundamental right to privacy in information that is already public), and because the plaintiffs were not members of a suspect class. *Id*. at 965. The plaintiffs argued that no rational basis existed under the SACA for treating sex offenders differently from other offenders because when a court sets aside a conviction under the SACA, the court has determined that the offender is not dangerous and does not pose a threat to the public. *Id*. at 966. In response to the plaintiffs' argument, the Court noted the plaintiffs' inaccurate application of the statutory language used in the SACA. The Court explained:

> "To be accurate, under the SACA, the court makes only a determination 'that setting aside the conviction is consistent with the public welfare.' [MCL] 780.621(9). However, when the state court finds that setting aside the conviction of a sex offender is consistent with the public welfare, it knows that the sex offender will continue to be subject to the registration requirements of the SORA. Therefore, the state court determines that a sex offender does not pose a threat to the public only to the extent that the offender remains on the PSOR. Furthermore, the state court's determination is not a guarantee that the offender poses no threat. Despite the determination under the SACA, it remains rational for Michigan to seek 'to provide law enforcement and the people of [Michigan] with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger.' [MCL] 28.721(a)." *Does II & III*, *supra* at 966-967.